As to substantive due process, contrary to Petitioners' contention, conduct was addressed. The Fourth Circuit ruled that the state court determination of arbitrariness did not equate to a federal constitutional violation. (4th Cir. Op., Pet. App. at 9.) This finding wholly comports with Fourth Circuit precedent, *see Sylvia Dev.Corp.v. Calvert County*, 48 F.3d 810, 825 (4th Cir. 1995), that of other circuits, *see, e.g., SFW Arecibo, Ltd. v. Rodriguez*, 415 F.3d 135, 141 (1st Cir. 2005); *Yale Auto Parts v. Johnson*, 758 F.2d 54, 58-60 (2d Cir. 1985); *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 401-02 (3d Cir. 2003); *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994) ("a person contending that state or local regulation of the use of land has gone overboard must repair to state court"), and this Court, *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 848 (1998) ("[W]e have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm.").

Having found that the conduct did not rise to the level of a constitutional violation, the Fourth

Circuit did not apply the entitlement test[1] to affirm the District Court's decision. However, it could have easily done so, because the ordinance in question gave the design board considerable discretion in evaluating applications. *See* (D. Ct. Order, Pet. App. at 22-25); *see also* (Resp. Br. to 4th Cir., Resp. App. at 9a-54a.)

Property interests protected by substantive due process are those recognized as fundamental, rooted in history and tradition. *See Washington v.*

---

[1] The Fourth Circuit holds that, absent an entitlement to a permit, there is no protected property interest for purposes of federal due process, either procedural or substantive. *See Sylvia,* 48 F.3d at 826. This is the majority approach, *see Macone v. Town of Wakefield,* 277 F.3d 1, 9-10 (1st Cir. 2001); *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 914-18 (2d Cir. 1989); *Bituminous Materials, Inc. v. Rice County*, 126 F.3d 1068, 1070-71 (8th Cir. 1997); *Norton v. Village of Corrales*, 103 F.3d 928, 931-33 (10th Cir. 1996); *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 201-04 (6th Cir. 1995); *MacKenzie v. City of Rockledge*, 920 F.2d 1554, 1558-59 (11th Cir. 1991), and it has proved useful in preventing the federal courts from becoming super zoning boards for municipal decisions. Two circuit courts do not apply the entitlement test. *See DeBlasio v. Zoning Bd. of Adjustment for the Township of West Omwell*, 53 F.3d 592, 598-601 (3d Cir. 1995); *River Park, Inc.*, 23 F.3d at 165-67. However, each has suggested that the proper place for run-of-the-mill zoning disputes, like the one at issue, is the state courts. *See United Artists*, 316 F.3d at 402 (adopting a "shocks the conscious" test and stating that such test should prevent the federal courts from "being cast in the role of a "'zoning board of appeals.'"); *River Park, Inc.*, 23 F.3d at 167 ("the idea in zoning cases is that the due process clause permits municipalities to use political methods to decide, so that the only procedural rules at stake are those local law provides, and these rules must be vindicated in local courts").

Glucksberg, 521 U.S. 702, 720-21 (1997). It has been noted that freedom from delay in receiving a regulatory permit hardly fits this bill. *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 200 (2003) (Scalia, J., concurring).

This Court has been clear that only the most egregious, abusive executive action, that which shocks the conscience, is arbitrary in the constitutional sense. *See County of Sacramento,* 523 U.S. at 846. This case involves no such conduct.

Petitioners contend the state trial judge's characterization of the council's conduct is competent evidence on the issue of abusive executive action. (4th Cir. Op., Resp. App. at 9); (Pet. Br. to 4th Cir., Pet. App. at 149.) This contention is untenable. The state trial judge relied solely on state zoning precedent, where sufficiency of evidence is the standard of review. (Op. S.C. Ct. App. Pet. App. at 41, discussing the standard of review.) The final order in the state proceedings, that of the appellate court, *see* discussion *infra* Part 2, held the decisions of the council were arbitrary, not because they were irrational, but because they lacked evidentiary support. This is hardly conscious shocking conduct. *See County of Sacramento,* 523 U.S. at 846. And, given the nature of zoning, reacting to public input is predictable, if not to be expected. *See Sylvia Dev. Corp.*, 48 F.3d at 828, 829 ("Indeed it is the very essence of elected zoning officials' responsibility to mediate between developers, residents, commercial interests, and those who oppose and support growth and development in the community . . . . It is not

pernicious per se for a zoning authority to be influenced by political pressure in the community").

Casting the nature of conduct required to sustain a substantive due process claim as including erroneous applications of land use laws will make every routine zoning decision a case of constitutional import. This premise has been rejected in equal protection analyses. *Snowden v. Hughes*, 321 U.S. 1, 11-12 (1944). Substantive due process should be no different.

Petitioners lacked the requisite protected property interest to support a substantive due process claim in the first instance, and produced no competent evidence of arbitrary conduct in the constitutional sense in the second.

As for remedies, state law accommodated what was sought, a building permit.[2]

2. THE FOURTH CIRCUIT CORRECTLY ANALYZED THE STATE PRECLUSION CLAIMS

Federal courts must apply state preclusion rules to determine if a prior state court judgment

---

[2] Petitioners' reference to S.C. Code § 16-5-60 (2005) for the proposition that the zoning remedy is inadequate because a county (but not a municipality) may be sued for damages of obstructing the exercise of constitutional rights widely misses the mark. To the extent this issue is appropriate for review, as it was not raised in prior proceedings, the statute has no efficacy here. The statute is intended to protect against intimidation for the exercise of civil rights. Petitioners were not obstructed in the exercise of any right.

has either issue or claim preclusion effect in a § 1983 action. 28 U.S.C. § 1738. For *res judicata* to apply, South Carolina law requires an identity of parties, identity of subject matter and adjudication of the claim in the former suit. *Plum Creek Dev. Co. v. City of Conway*, 512 S.E.2d 106, 109 (S.C. 1997). Both the Fourth Circuit and District Court concluded that the state court judgment had no preclusive effect. (4th Cir. Op., Pet. App. at 7-8); (D. Ct. Order, Pet. App. at 177-180.) This Court should adhere to its practice of not reviewing a construction of state law that has been agreed upon by two lower federal courts. *See Stenberg v. Carhart*, 530 U.S. 914, 939 (2000).

With regard to whether the claim has been previously adjudicated, Petitioners rely on a single line in the state trial court order. (Pet. at 25); (St. Tr. Ct. Order, Pet. App. at 46-47.) This contention is ludicrous, when the record of the state proceedings and the positions advanced there by Petitioners reveal the state proceedings were limited to whether a zoning law had been correctly applied under state zoning precedent.[3] *See* (Excerpts, Tran. St. Tr. Ct. Hrg., Resp. App. at 63a-68a); (Pet. Br., S.C. Ct. App., Resp. App. at 55a-62a); *see also* (Op. S.C. Ct. App., Pet. App. at 41, discussing standard of review.)

---

[3] The federal claims could not have been litigated in the state courts. The state proceedings were limited to the record; therefore, there was no ability to supplement the record, offer testimony or pursue discovery. South Carolina courts do not apply *res judicata* in instances where claims could not be asserted, even if they arise from common facts of prior litigation. *See P.J. Constr. Co., Inc. v. Roller*, 340 S.E.2d 564, 565-66 (S.C. Ct. App. 1986).

Furthermore, the state court judgment to which preclusion rules applies is that of the South Carolina Court of Appeals, not the state trial court. *See Barth v. Barth*, 360 S.E.2d 309, 310 (S.C. 1987) ("ordinarily, the disposition of a case in the Court of Appeals when certiorari is not...granted becomes the law of the case"). That court limited its review to state zoning precedent. (Op. S.C. Ct. App., Pet. App. at 41.)

In considering the issue, the Fourth Circuit stated that the South Carolina Court of Appeals order was "nothing other than a Court review of an administrative determination by local zoning authority" wherein the federal Constitutional rights of due process and equal protection were not adjudicated. (4th Cir. Op., Pet. App. at 7). This assessment was correct in light of the holding of the state court of appeals:

> These five stated issues essentially present two arguments. First, did the trial court err in reversing City council's decision because there was evidence in the record to support the decision? Second, did the trial court err is substituting its judgment for that of the City Council?
>
> . . . .
>
> We conclude the decision of the City Council was arbitrary because it was based, not on the evidence in the record and the aesthetic concerns of the CAB

> ordinance, but upon the objections of citizens of the neighborhood who wanted to stop further development in the area.

(Op. S.C. Ct. App., Pet. App. at 42, 45.)

The District Court also considered whether the issues were actually litigated in state court. At the hearing on Petitioners' motion for summary judgment the following colloquy occurred between the District Court and counsel for Petitioners:

> The Court: In your brief to the Supreme Court of South Carolina and to the Court of Appeals....did you argue that the conduct of the Defendant's violated due process law?
>
> Mr. Zayicek: Well, they brought up the fact that
>
> The Court: You either did or you didn't. My question is did you argue that in your brief?
>
> Mr. Zayicek: It was argued before the Court of Appeals.
>
> The Court: What cases did you sight?
>
> Mr. Zayicek: We did not sight any cases.

> The Court: I didn't ask what they did I asked what you did.
>
> Mr. Zayicek: We did not.
>
> The Court: You did not sight any federal law?
>
> Mr. Zayicek: No sir.
>
> The Court: To support there was a federal violation?

(D. Ct. Hearing, Pet. App. at 178-79).

Petitioners' *res judicata* claim also fails because there is no identity of the subject matter. The state proceeding was an administrative appeal, limited to the record, where the standard of review was whether the decision had evidentiary support. *See Peterson Outdoor Adver. v. City of Myrtle Beach*, 489 S.E.2d 630, 632 (S.C. 1997). This § 1983 action turns on whether, under color of state law, a policy was applied to these Petitioners that deprived them of constitutional rights, and as to the individual Respondents, whether such was done in disregard of known constitutional rights. *See Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690-94 (1978); *Elder v. Holloway*, 510 U.S. 510, 512 (1994). If there is any question as to identity of subject matter, South Carolina law inquires if the same proof would support each case. *Griggs v. Griggs*, 51 S.E.2d 622, 626 (S.C. 1949). As the proof required to sustain the state litigation differs substantially from the proof required here, there is no identity of subject matter.

Finally, Petitioners' claim should fail because there is no identity of parties. The individual Respondents were not parties to the state litigation. (Pet. Br., S.C. Ct. App., Resp. App. at 55a.)

3. THE FOURTH CIRCUIT CORRECTLY DISPOSED OF THE EQUAL PROTECTION CLAIM

Equal protection is not implicated by merely showing disparate treatment among those similarly situated. Equal protection requires a showing of intentional, purposeful discrimination, a motive that is not presumed. *Snowden*, 321 U.S. at 8.

The basis of Petitioners' equal protection claim has been a moving target throughout this litigation. Their complaint alleged a violation of equal protection because of the location of their project on the second row back from the front beach. (Amended Complaint, Pet. App. at 171-72.) At summary judgment and on appeal, Petitioners argued they were denied equal protection because other high rises had been approved, but not theirs. (Pet. Br. 4th Cir., Pet. App. at 150-55.) The Fourth Circuit correctly noted that the orders denying approval were not based on either of these grounds. (4th Cir. Op., Pet. App. at 10.) Even if they had

been, Petitioners were required to proffer evidence of willful, purposeful discrimination.[4]

Petitioners resort to the trial court order as evidence of malice. The final order in the state litigation, that of the Court of Appeals, *see Barth*, 360 S.E.2d at 310, simply held that the acts of Respondents were arbitrary because they were without evidentiary support. (Op. S.C. Ct. App., Pet. App. at 45.) That court did not address, much less hold, that the acts were intentional or the result of bias, animus, or ill will. As such motives are not presumed, *see Snowden*, 321 U.S. at 8, Petitioners were required to proffer competent evidence that the acts of Respondents were motivated by purposeful, intentional discrimination. This they did not do. Viewing the record in the light most favorable to Petitioners reveals that projects similar to theirs were approved. However, theirs was not approved due to Respondents reacting to public sentiment and not applying the criteria of the design review ordinance. Such is hardly the degree of conduct that supports an equal protection violation.

Petitioners contend that misdirected applications of state law implicate equal protection claims. Such a construction of the clause "which would find a violation of federal right in every

---

[4] *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) was before the court on a Rule 12(b)(6) motion, where the sufficiency of pleadings is the test. These Petitioners were before the court on a motion for summary judgment, and unlike the Olechs, were required to proffer competent evidence on every element of their claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

departure by state officers from state law is not to be favored", *id.* at 11-12, and will lead to "transforming run-of-the-mill zoning cases into cases of constitutional right." *Village of Willowbrook v.Olech*, 528 U.S. 562, 566 (2000) (Breyer, J., concurring in the result). Such is a slippery slope upon which this Court need not embark.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

/s/ Frances I. Cantwell
Frances I. Cantwell
Counsel of Record
William B. Regan
Regan and Cantwell, LLC
105 Wappoo Creek Drive - Suite 1-A
Charleston, South Carolina 29412
Tel: 843-762-8282
Fax: 843-762-8284

L. Gregory C. Horton
Timothy C. Dargan
Buist, Moore, Smythe & McGee, PA
P.O. Box 999
Charleston, South Carolina
29402-0999
Tel: 722-3400
Fax: 723-7398

Attorneys for the Respondents

APPENDIX

TABLE OF CONTENTS

Appendix Page

Order of City Council of the
City of Myrtle Beach
Re: Disapproving Application of
St. John's Inn
entered September 8, 1998 ..... 1a

Order of City Council of the
City of Myrtle Beach
Re: St. John's Inn
entered November 30, 1998 ..... 6a

Excerpts of Brief of Appellees in
The United States Court of Appeals
for the Fourth Circuit
dated February 8, 2005 ..... 9a

Excerpts of Respondents' Final Brief in
The South Carolina Court of Appeals
filed January 7, 2000 ..... 55a

Excerpts of Transcripts of
Hearing before
The Honorable J. Stanton Cross, Jr.
on February 23, 1999 ..... 63a

Excerpts of *De Novo* Hearing
Before Myrtle Beach City Council
Acting as the Community Appearance Board
on September 3, 1998 ..... 69a

Excerpts of *De Novo* Hearing
Before Myrtle Beach City Council
Acting as the Community Appearance Board
on November 10, 1998 ..... 74a

Excerpts of *De Novo* Hearing
Before Myrtle Beach City Council
Acting as the Community Appearance Board
on September 3, 1998 ..... 78a

Excerpts of *De Novo* Hearing
Before Myrtle Beach City Council
Acting as the Community Appearance Board
on November 10, 1998 ..... 80a

Excerpts of Transcript of
Deposition of Larry Bragg
taken November 17, 1999 ..... 83a

STATE OF SOUTH CAROLINA

BEFORE THE CITY COUNCIL OF THE CITY OF MYRTLE BEACH

COUNTY OF HORRY

IN RE:

ST. JOHN'S INN - APPEAL FROM THE COMMUNITY APPEARANCE BOARD

ORDER

[ENTERED: September 8, 1998]

This matter is before City Council pursuant to Section 605 of the Zoning Ordinance of the City of Myrtle Beach. The Applicant, St. John's Inn, appeals to Council from a decision of the Community Appearance Board (CAB) rendered on August 20. 1998 in which the CAB denied the application to construct a high-rise condominium project on its property at 6803 North Ocean Boulevard in the City of Myrtle Beach which would be in addition to an existing three or four story structure known as the St. John's Inn. A hearing *de novo* was held before City Council on September 3, 1998. Members of Council present and participating were:

Mayor Mark Struthers McBride
Councilwoman Judy Rodman
Councilman Charles W. Martino, Jr.
Councilman Wilson Cain
Councilman Crain Woods

Councilman W. Wayne Gray was present at the meeting but recused himself from the hearing on this matter because of a conflict of interest.

The applicant was represented at the hearing by Douglas M. Zayicek, Esquire, and by Thomas Pegram, the architect for the project. Rusty Helms also spoke on behalf of the applicant. The following spoke in opposition to the project: Michael Barnett, Esquire, representing the Property Owners Association from Seamark Towers, a neighboring high rise condominium structure; Arthur Reimer; Jean F. Ferguson; Grace Bosworth; Lorraine M. Hoist; Davis A. Hoist; and Maureen McGinty-Altman.

In this *de novo* hearing, City Council is free to accept new evidence and view the facts without regard to the determinations made by the CAB. Council must review the facts developed during the hearing and apply the criteria provided in section 604 of the Zoning Ordinance with particular consideration to the objectives set forth in section 601.

The CAB was created for the purpose, among others, of reviewing site developments so as to discourage unsightly or inharmonious development in the City. CAB review and approval is in addition to other requirements for development in the City. The CAB, and this Council in its capacity as the hearing board of review of CAB decisions, is charged with assuring that proposed developments do not detract from the design of surrounding properties and that they relate harmoniously to the

environment of the vicinity in which they are to be constructed.

The applicant in this case argues that its project satisfies all of the requirements of the zoning and building codes of the City. It further suggests that it will make minor adjustments as necessary to make the project satisfy CAB or Council objections. The opponents argue that a project of the size and density of the proposed project is not in harmony with the surrounding neighborhood, will result in unacceptable traffic congestion that will create serious traffic safety problems, will potentially cause environmental problems in the swash which runs adjacent to the project site because of stormwater runoff, and will negatively affect the views of its neighbors.

After reviewing all the information provided at the hearing. City Council makes the following findings of fact:

1. The proposed project is a fourteen-story building that would contain 98 individual residential units. The bottom five stories would be a parking garage.

2. The project as proposed meets all requirements of the Zoning Ordinance except approval by the CAB.

3. The unrelieved bulk of the proposed structure and its orientation on the lot are not compatible with the existing

buildings in the neighborhood or with the existing building on site.

4. The solid wall on the parking garage is required by the City Zoning Ordinance, but is lacking in architectural features to break the unrelieved visual effect.

5. The proposed location of the solid waste compactor will have an unacceptable visual impact on neighboring properties.

6. The available evidence did not adequately address the possible effects of storm water design on ground water or on the adjacent swash.

When these findings are examined in relation to the criteria in Section 604, Council concludes that the proposed development fails to meet the objectives in Section 601.2 (b) and (c) which are to "[d]iscourage monotonous, drab, unsightly, dreary and inharmonious developments"; and to "[c]onserve the city's natural beauty and visual character and charm by insuring that structures...are properly related to their sites, and to surrounding sites and structures...and that proper attention is given to the exterior appearance of structures...." In particular Council has applied the criteria in Sections 604.1.2, 604.1.4, and 604.1.7 to reach this conclusion (See exhibit A for Article VI of Zoning Ordinance). In reaching this conclusion. Council is conscious of the fact that the applicant may reapply for a permit at any time to build a revised project that addresses the

concerns raised herein. Such application would receive the same review as any other submission. including review by the CAB.

For the above reasons City Counsel disapproves the application 01 St. John's Inn

AND IT IS SO ORDERED.

/s/
MARK STRUTHERS McBRIDE
MAYOR

ATTEST:

/s/
JOAN GROVE,
CITY CLERK

DATED: Sept. 8, 1998

City of Myrtle Beach
SOUTH CAROLINA

[ENTERED: November 30, 1998]

November 25, 1998

Douglas M Zayicek, Esq.
Bellamy, Rutenberg, Copeland, Epps,
Gravely &. Bowers, P.A.
P.O. Box 357
Myrtle Beach, SC 29578

Dear Mr. Zayicek:

Re: St. John's Inn
Appeal from the decision of the Community Appearance Board
Your File: 13084-34600

Please accept this letter as written notice of the decision of City Council in the matter of the appeal from the October 1, 1998 decision of the Myrtle Beach Community Appearance Board. On that data the Board denied the application of your clients, Boulevard Development and St. John's Inn for a permit to construct a high-rise structure at 6803 North Ocean Boulevard.

Pursuant to the provisions of City Zoning Ordinance Section 606, City Council heard the appeal of your clients on November 10, 1998. After considering the material presented by the various parties in interest. City Council voted to uphold the decision of the Community Appearance Board and to

deny your clients' application far a permit to construct the proposed structure. The following findings were stated in the motion to deny the application:

1. The proposed project is a fourteen-story building that would contain 96 individual residential units. The bottom five stories would be a parking garage.

2. The project as proposed meets all requirements of the Zoning Ordinance except approval by the CAB.

3. The unrelieved bulk of the proposed structure and its orientation on the lot are not compatible with the existing buildings in the neighborhood or with the existing building on site.

4. The solid wall on the parking garage is required by the City Zoning Ordinance, but is lacking in architectural features to break the unrelieved visual effect.

5. The propose location of the solid waste compactor will have an unacceptable visual impact on neighboring properties.

6. The available evidence did not adequately address the possible effects of stormwater design on ground water or on adjacent swash.

As I believe you are aware, Section 607 of the Zoning Ordinance provides that any appeal from the decision of City Council is to the Circuit Court in and for Horry County.

Yours very truly,

/s/
Joan Grove
City Clerk

cc: (all interested parties)

RECORD NO. 04-2171

In The
United States Court of Appeals
For The Fourth Circuit

SUNRISE CORPORATION OF MYRTLE BEACH;
BOULEVARD DEVELOPMENT LLC;
S&H DEVELOPMENT INC.,
Plaintiffs – Appellants,

v.

THE CITY OF MYRTLE BEACH; MARK McBRIDE; JUDY RODMAN; RACHAEL BROADHURST; CHARLES MARTINO; WILSON CAIN; CRAIN WOODS; LARRY BRAGG; TOM CONN; TOM DAVIS; SALLY HOWARD; FRED ROURK, Individually,
Defendants – Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AT FLORENCE

BRIEF OF APPELLEES

Frances I. Cantwell
William B. Regan
REGAN AND CANTWELL, LLC
105 Wappoo Creek

L. Gregory Cook Horton
Adriane Malanos Belton
BUIST, MOORE, SMYTHE & McGEE, PA
Post Office Box 999

Drive, Suite 1-A
Charleston, South Carolina 29412
(843) 762-8282

Counsel for Appellees

Charleston, South Carolina 29402
(843) 722-3400

Counsel for Appellees

JURISDICTIONAL STATEMENT

Appellees adopt the Jurisdictional Statement set forth in Appellants' Brief.

STATEMENT OF ISSUES

1. Do State of South Carolina preclusion rules prevent Appellees from contesting liability for alleged violations of the due process, Equal Protection and Fifth Amendment clauses of the United States Constitution?

2. Does a party have standing to sue for damages based upon an erroneous denial of a permit to a third party?

3. Was the District Court correct to dismiss the Due Process claims in light of the discretion embodied in the CAB ordinance and the availability of a remedy provided by the ordinance and state law to correct errors made during that process?

4. Was the District Court correct to dismiss the equal protection claim in light of the legitimate state interest being pursued by Appellees and the lack of evidence to support any intentional, invidious discrimination?

5. Was the District Court correct to dismiss the takings and inverse condemnation claims where there was no physical appropriation of property, Appellees had use of their property throughout the state proceedings, the property was sold at a substantial profit, and the delay in securing the contested permit was related solely to the time required to obtain judicial review?

STATEMENT OF THE CASE

This action was commenced on December 17, 1998 in the state courts of South Carolina to recover damages allegedly resulting from of Appellees' refusal to grant design approval to one of the Appellants' construction projects. The causes of action asserted by Appellants included violations of state and federal due process and equal protection; a fifth amendment taking; inverse condemnation; and arbitrary decision making. Attorneys fees and costs were sought under 42 U.S.C. § 1988.

Appellees removed the case to the Florence Division of the United States District Court for the District of South Carolina. Pending in state court at

that time were two administrative appeals from decisions of the City Council of Myrtle Beach denying design review approval. This matter was stayed pending the outcome of those appeals. (Docket Entry 1, Minute Entry; J.A. pp. 5, 6.)

In May 1999, the state trial court issued an order reversing the decisions of the City. The City appealed, and in February 2001, the South Carolina Court of Appeals issued an opinion affirming the result reached by the trial court. The Court of Appeals held the decisions rendered by the City were without evidentiary support and that a remand would be futile. A petition for a writ of certiorari was granted by the South Carolina Supreme Court, but thereafter dismissed as improvidently granted in December 2002. (J.A. pp. 216-227.)

The stay of this case was lifted in May 2003, and a hearing was held on the parties' cross motions for summary judgment on September 4, 2003. At the conclusion of the hearing, the Honorable C. Weston Houck issued an oral order: (1) denying Appellants' motion for summary judgment on the issue of whether state preclusion rules prevented the City from contesting liability; (2) granting Appellees' motion for summary judgment on Appellants' federal due process and equal protection claims; (3) dismissing the federal takings claim as unripe; and (4) reserving all other issues. (District Court Order; J.A. p. 666-667.)

Appellants' Motion to Reconsider was heard in October 2003. Judge Houck permitted additional briefing, and on August 9, 2004, issued a written

order: (1) dismissing two plaintiffs for lack of standing; (2) denying Appellants' motion to reconsider; and (3) granting Appellees' motion for summary judgment on the takings and inverse condemnation claims. (District Court Order; J.A. pp. 663-679.)

On September 8, 2004, Appellants filed a notice of appeal of the orders of September 4, 2003, and August 9, 2004. (J.A. p. 680.)

STATEMENT OF FACTS

Article VI of the zoning ordinance of the City of Myrtle Beach provides for a Community Appearance Board ("CAB"). At all times pertinent to this action, the CAB ordinance required a board appointed by the City Council to approve the design, siting and exterior of certain construction in the City. No building permit could be issued absent CAB approval of the proposed construction.

The CAB ordinance specified criteria by which projects were to be evaluated and permitted an applicant aggrieved by a decision of the CAB to appeal to City Council. In such instances, the Council sat as the CAB and considered the application *de novo*. The ordinance further provided for an appeal from the Council to the state circuit court. (CAB Ordinance, §§ 602.1, 603, 604, 606, 607; J.A. pp. 47-52 .)

In 1996, S&H Development Corporation of Myrtle Beach, L.L.C. ("S&H") purchased a 2.7 acre site in the City for $3.1 million. The site consisted of

six separate lots of record. At the time of purchase, the site included an 88 room inn ("St. John's Inn"), a restaurant and areas used for parking. Buildings on the site straddled property lines of the lots comprising the site. (Mot. Summ. J., Ex. 2, Sorrells' Dep.; J.A. pp. 55-56.)

S&H rented the restaurant and operation of the Inn to Sunrise Corporation, a South Carolina corporation ("Sunrise"). Pursuant to a verbal agreement, S&H assigned to Boulevard Development, L.L.C. ("Boulevard") all development rights to the site. S&H, Sunrise, and Boulevard are all controlled by Bruce W. Helm, Ronald Sorrells and/or Marilu Sorrells. (Mot. Summ. J., Ex. 2, Sorrells' Dep.; Ex. 3 and 4, Helm's Dep.; Ex. 5, Answer to Interrogs., No. 10; J.A. pp. 55-75.)

After considering various development schemes, Boulevard determined to construct a 14-story condominium/parking tower on lots 4 and 5, the westernmost portion of the site that were then being used for parking. Boulevard retained an architect and business consultant. It explored financing options, hired a real estate agency to pre-sell units, solicited bids for construction, entered negotiations with a builder and executed contracts for the sale of individual condominium units. (Mot. Summ. J., Ex. 3, Helm's Dep.; Ex. 5, Answers to Interrogs., Nos. 10,11, and 12; Ex. 6, Pegram contract; Ex. 7, Hoffman contract; J.A. pp. 60-62, 69-70, 77-87, 89-92.) These activities were pursued prior to Boulevard ever applying for CAB approval.

In August 1998, Boulevard applied for CAB approval. The CAB refused to approve the project, and Boulevard appealed to the City Council. At a workshop held on September 3, 1998, Boulevard appeared before the Council, then sitting in the capacity as the CAB. Its presentation attempted to address concerns raised, and included new renderings of the project. The project, as presented, proposed constructing a building twice as large as those already on site, within 52 feet of a nearby condominium structure, and on an area that comprised approximately 17% of the square footage of the site. (Mot. Summ. J. Ex. 8, Application for Bld. Permit; Ex. 9, Project Data and Excerpts from 9/3/98 Hr'g; J.A. pp. 93-99.) The project's loading and solid waste components were proposed to be sited at a location visible to the occupants of neighboring condominiums and the users of an adjoining public street. The project adjoined an environmentally sensitive swash and the storm water was to be handled by an underground exfiltration piping system. There was strenuous public opposition to the project, with concern raised over a number of issues, including, the size of the tower, its location on the site, its effect on nearby structures, its effect on traffic, the location of the dumpster and the effect on storm water. General anti-development and anti-growth complaints were also made. (Mot. Summ. J. Ex. 23, 25, Council Hr'g Excerpt; J.A. pp. 172-179 and 187-190.)

The Council refused to approve the project and issued a written order on September 8, 1998. An alternate proposal was requested. Boulevard appealed Council's denial to the state circuit court.

(Mot. Summ. J., Ex. 10, Order of Council; Ex. 11, Pet.; J.A. pp. 100-107, 172-192.)

In October 1998, Boulevard reapplied to the CAB, presenting the version of the project that had been turned down by the Council at its September hearing. (Mot. Summ. J., Ex. 12, Bragg's Dep.; J.A. pp. 108-110.) The CAB did not approve the project, and Boulevard again appealed to the Council. The Council considered the matter at a meeting held on November 10, 1998, where it declined to approve the project, citing the reasons previously given in its September order. Boulevard took a second appeal to the state circuit court. (Mot. Summ. J., Ex. 13, Council Order; Ex. 14, Pet.; J.A. pp. 112-118.)

In December 1998, this action was commenced, seeking damages from the City and the members of Council who had voted against the project.[1] The gravamen of the Complaint is that the failure to approve the project violated rights guaranteed by the state and federal constitutions.

In May 1999, the state trial court issued an order reversing the actions of the City. On appeal, the South Carolina Court of Appeals affirmed, holding that the actions of City were without evidentiary support and a remand would be futile. (J.A. pp. 417-426.)

---

[1] By oral order issued on September 26, 2003, Judge Houck granted Appellants' motion to amend the Complaint to add as parties the members of the appointed board who had voted against the project. (Docket Entry 37; J.A. p. 8.)

In this action, Boulevard seeks damages for its pre-development costs, including architect and consulting fees, lost profits anticipated from the sale of condo units, expenses incurred to bond the architect's lien and potential expenses related to lawsuits expected to be filed by its contractor and realtor.

S&H seeks to recover damages purportedly inuring to it by virtue of being denied a debt free hotel, based on a verbal arrangement with Boulevard as to the application of the proceeds of the sale of condo units.

Sunrise seeks damages for profits lost when it slowed hotel and catering bookings in expectation of Boulevard getting a building permit. It (or a yet to be formed entity) also claims damages from anticipated profits resulting from managing bookings for the Inn and the to-be constructed tower over the next 20 years. (Mot. Summ. J., Ex. 5, Answers to Interrogs., Nos. 10-15; Ex. 15, Excerpts of Damage Brochure; J.A. pp. 69-71, 121-123.)

In 1999, Boulevard Conversions, L.L.C., was formed to convert the Inn and amenities to a horizontal property regime. S&H sold all its interest in the site to Boulevard Conversions, L.L.C., for $4 million. Boulevard Conversions subsequently sold the commercial component of the horizontal property regime (restaurant and front desk) and started selling the 88 condo units. The rights to develop a tower on this site are now controlled by Boulevard Conversions, L.L.C. (Mot. Summ. J., Ex. 16 Contract; Ex.17, Helm's Dep.; J.A. pp. 125-136.)

SUMMARY OF ARGUMENT

State preclusion rules would not bar Appellees from contesting the Appellants' federal due process, equal protection or Fifth Amendment causes of action. Under South Carolina law, *res judicata* applies only where the parties are the same, the subject matter of prior litigation is the same and the issues were actually adjudicated. None of these criteria are satisfied. Collateral estoppel has no application because the issues raised here were not decided by the state court, and did not have to be decided in order to support the state judgment. Even if it were otherwise, because there is no mutuality of parties in this suit and the state proceedings, a number of Appellees did not have a full and fair opportunity to litigate the issues raised, precluding the application of collateral estoppel.

Neither S&H nor Sunrise have standing because neither had any rights to construct the project at issue, and neither ever made any permit application. Because these parties cannot base their claims for relief on the legal rights of a third party, the district court was correct to dismiss them from the suit.

The district court's disposition of the federal due process claims wholly comports with precedent of this circuit. The discretion embodied in the design review process defeats a legitimate claim of entitlement to the design review permit. Absent such a right, there is no legally protected property interest for purposes of federal due process. The existence of a remedy to correct deficiencies of the

design review process (which was successfully used by Boulevard) further defeats a substantive and procedural due process claim.

The district court's disposition of the equal protection claim was proper. This claim is not barred by state preclusion rules, and Appellants failed to demonstrate any invidious, intentional discrimination on the part of Appellees.

The district court's disposition of the takings claims was appropriate. There was no physical appropriation of any of Appellants' property. The application of the design review ordinance was in pursuit of a legitimate governmental interest and did not deprive Appellants of all use of their property. The district court's analysis of a factored taking correctly balanced the considerations of Penn Cent Trans. Co. v. City of New York, 438 U.S. 104 (1978), and reached the correct result.

ARGUMENT

STANDARD OF REVIEW

Summary judgment is warranted if, from the totality of the evidence presented, including pleadings, discovery and affidavits, the court is satisfied there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. A party faced with a summary judgment motion must present evidence sufficient such that a reasonable juror could find, by a preponderance of the evidence, in his favor. Sylvia

Dev. Corp. v. Calvert County, Maryland, 48 F.3d 810, 817-818 (4th Cir. 1995).

Entry of summary judgment is mandated, "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and [upon] which that party will [have] the burden of proof at trial," because a "failure of proof [of] an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986).

A review of an award of summary judgment is *de novo*. Temkin v. Frederick County Comm'rs, 945 F.2d 716, 718 (4th Cir. 1991).

I. STATE PRECLUSION RULES DO NOT BAR APPELLEES FROM CONTESTING LIABILITY.

28 U.S.C. § 1738 obligates federal courts to apply state preclusion rules to determine whether a prior state court judgment has either issue or claim preclusion effect in a § 1983 action. Dionne v. Mayor and City Council of Baltimore, 40 F.3d 677, 682 (4th Cir. 1994)(citing 28 U.S.C. § 1738).

In South Carolina, to establish claim preclusion, or *res judicata*, one must show: (1) the identities of the parties are the same as in the prior litigation; (2) the subject matter is the same as the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent

jurisdiction. *Res judicata* bars a litigant from raising any issues which were adjudicated in a former suit, or which might have been raised in the former suit. Garris v. Governing Bd. of S.C. Reinsurance Facility, 511 S.E.2d 48, 57 (S.C. 1998); Pye v. Aycock, 480 S.E.2d 455, 458 (S.C. 1997).

Issue preclusion, or collateral estoppel, applies when a second action is based upon a different claim. The judgment in a prior action precludes re-litigation of only those issues actually and necessarily litigated and determined in the first suit. A party seeking issue preclusion "must show that the issue was actually litigated and directly determined in the prior action and that the matter or fact directly in issue was necessary to support the first judgment." Beall v. Doe, 315 S.E.2d 186, 191 (S.C. Ct. App. 1984). When the parties in the proceedings differ, non-mutual collateral estoppel may be asserted unless the party sought to be estopped lacked a full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him the opportunity to relitigate the issue. Graham v. State Farm Fire Cas. Ins. Co., 287 S.E.2d 495, 496 (S.C. 1992).

A. South Carolina courts would not apply *res judicata* to this case.

1. There is no identity of parties.

The parties in the state litigation were Boulevard and an entity denominated as "St. John's Inn" as appellants, and the City of Myrtle Beach, as respondent. Here, the parties-defendants include

the City and the individual members of the City Council and CAB who voted against the project. (J.A. pp. 266; 269; Docket Entry 38; J.A. p. 9.) Appellants maintain that the action against the City in state court precludes the individual defendants from contesting liability here because the individual defendants and the City are in privity. They are not.

"Privity exists when one has the same relationship to the issue determined as the party who litigated it." James F. Flanagan, South Carolina Civil Procedure ch. 90 § E(a) (2d ed. 1996). In the context of *res judicata* or collateral estoppel, "privity does not embrace relationships between persons or entities, but [instead] deals with a person's relationship to the subject matter of the [previous] litigation." Richburg v. Baughman, 351 S.E.2d 164, 166 (S.C. 1986).

In state court, the City was the litigant. Even if the final state court decision reached constitutional issues, the City's liability on a constitutional claim would attach upon proof of an official policy or custom that was utilized in derogation of federal rights. See Spell v. McDaniel, 824 F.2d 1380, 1384 (4th Cir. 1987). In contrast, the individual Appellees would be liable only if they were found to have acted in utter disregard of a known constitutional right. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The individuals have immunity defenses that are not available to the City. See Burtnick v. McLean, 76 F.3d 611, 612 (4th Cir. 1996). In short, the relationship of the City and the individuals to the subject matter of a lawsuit based on a constitutional

violation differs as to liability, the evidence required to establish liability, and available defenses. Accordingly, there is no privity between the City and the individual Appellees.

Further, since the individual defendants were not parties to the state proceedings and could not, as a matter of law, obtain a review of that decision as it affected them, they are not bound by that proceeding. See Wade v. Berkeley County, 498 S.E.2d 684 (S.C. Ct. App. 1995).

> Some litigants – those who never appeared in a prior action – may not be collaterally estopped without litigating the issue. They never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

Richburg, 351 S.E.2d at 166 (quoting Blonder-Tongue Labs., Inc. v. Univ. of Ill.

Found., 402 U.S. 313, 329 (1971)(citations omitted)).

Finally, two Appellants (Sunrise and S&H) were not parties in the state litigation. The identity of the parties in the state litigation and this litigation differs.

2. The subject matter of this case differs from the state court litigation.

The state proceedings were nothing more than an appellate review of an administrative determination made by a local zoning authority. S.C. Const., Article V § 11 grants to the circuit court "...original jurisdiction in civil and criminal cases and... such appellate jurisdiction as provided by law". Then applicable state enabling legislation devolved appellate jurisdiction to the circuit court of zoning matters. S.C. Code Ann. § 5-23-340 (West 1976.)

In the state litigation, Boulevard, the trial judge and the court of appeals all acknowledged that the issue there was whether there was evidence in the record to support the decision of the City, or whether the City had abused its discretion. Each relied on a state court decision setting the standard for the review of a decision of this very design board. See Peterson Outdoor Adver. v. City of Myrtle Beach, 489 S.E.2d 630 (S.C. 1997). Here, the issue is whether the Appellants were subjected to a policy or custom in derogation of federal constitutional rights, or whether the individual defendants, under color of state law, acted in deliberate indifference to known constitutional rights.

As to due process, Appellants must prove by-right entitlement to CAB approval, and as to equal protection, an irrational classification and purposeful intent to discriminate. See Sylvia Dev. Corp., 48 F.3d 810. The facts required to prove these

causes of action differ substantially from the facts required to prevail in the state litigation. The state proceedings rested on the sufficiency of evidence. The South Carolina Court of Appeals so held. (J.A. pp. 422-426.) Here, the proceedings turn on whether Appellants can establish a deprivation of federal rights pursuant to official policy or custom or on account of deliberate indifference to constitutional rights. Spell, 824 F.2d at 1384; Harlow, 457 U.S. at 818. The subject matter of the state litigation vastly differs from the subject matter of the action before this court.

The South Carolina Supreme Court has held that if it is questionable if a second cause of action is the same as the first, a test to be applied is whether the facts essential to the maintenance of each cause of action are identical, or if the same evidence would support each cause of action. Griggs v. Griggs, 51 S.E.2d 622, 626 (S.C. 1949). There is no doubt that the facts required to sustain the state case and this case differ, as does the evidence necessary to sustain each. The subject matter of the two suits also differs, precluding the application of res judicata.

3. Federal constitutional claims were not adjudicated in state court, nor could they have been.

While Boulevard raised constitutional issues in its state pleadings, it did not specify what constitution was in play. Even under the most liberal view of notice pleading, its state pleadings fall far short of providing fair notice that federal constitutional violations to support monetary

liability were being alleged. Even if alleged, they certainly were not tried.

Boulevard's argument in state court was based entirely on state law applicable to a review of zoning decisions. At trial, its counsel stated:

> Your Honor, it is the Appellants' position that the City of Myrtle Beach's denial must be reversed because the action was arbitrary, subjective, without evidentiary support, and really a pretense to stop the development of Myrtle Beach.
>
> ****
>
> In the Peterson case, the Supreme Court held that a zoning decision must be overturned if it is arbitrary or subjective, is based on an error of law, is without evidentiary support, and the Board acts arbitrarily and unreasonably, or when, in general, there is an abuse of discretion.

(Circuit Ct. Tr., J.A. pp. 289-290 and 332, 333.)

In its state appellate brief, Boulevard maintained the standard of review was based solely on Peterson Outdoor Adver., 489 S.E.2d 630, a zoning case where the issue was whether an abuse of discretion had occurred. The analysis of due process and equal protection in its appellate brief was based, not on the deprivation of a protected property interest or purposeful discrimination, but on the

unreasonableness of the decisions in light of the evidence. (Mem. Opposing Summ. J., Ex. 5, Boulevard's Final Brief, S.C. Ct. App.; J.A. pp. 427-433.)

The court of appeals decision, which is the law of the state case, affirmed the circuit court, but not on constitutional issues. The court affirmatively pronounced that the questions presented but two issues, to wit: (1) whether evidence existed to support the council's decisions; and (2) whether an improper substitution of judgment had occurred. (J.A. p. 423.) The court affirmed the circuit court because it determined that there was insufficient evidence to support the decisions of Council, and that a remand to the Council would be futile. (J.A. pp. 423-426.)

In South Carolina, an appellate court may affirm a trial judge's decision on any ground appearing in the record. If a correct result has been reached, a decision will be affirmed, even if error is made on another ground. The reasoning of a trial judge is not binding on an appellate court if the record discloses a correct result. Potomac Leasing Co. v. Otts Mkt., Inc., 358 S.E.2d 154, 156 (S.C. Ct. App. 1987). Appellants' protestations notwithstanding, the decision of the Court of Appeals, the final state judgment, did not reach federal constitutional claims.

State judges are bound to follow opinions of the United States Supreme Court U.S. Const. art. VI; See Manning v. Hunt, 119 F.3d 254 (4th Cir. 1997). South Carolina explicitly adheres to federal

precedent. See Worsley v. Town of Mount Pleasant, 528 S.E.2d 657 (S.C. 2000) (due process); Butler v. Edgefield, 493 S.E.2d 838 (S.C. 1997) (equal protection). The dearth of evidence proffered or argument made on constitutional issues in state court, and the reasoning of the state court of appeals dispels any contention that federal constitutional issues were decided. The circuit court's holding regarding due process, equal protection and taking undoubtedly arose from its view of the council having determined the appeals contrary to the evidence that was before it. No where in its voluminous order did the circuit court undertake an analysis of federal constitutional claims. Its holding regarding due process, equal protection and taking was, at best, *gratis dictum*, and in any event, not adopted by the Court of Appeals.

Finally, constitutional issues could not have been litigated in the state proceedings. The state proceedings were limited to a review of the record. The state proceedings presented no occasion to supplement the record, offer additional testimony or pursue discovery. The ability to litigate a violation of constitutional rights on an as-applied basis could not have been accomplished within the framework of the state administrative appeals. In South Carolina, *res judicata* will not be applied when claims could not be asserted, even when they rise out of common facts of prior litigation. PJ Const. Co. v. Roller, 340 S.E.2d 546, 565-566 (S.C. Ct. App. 1986).

B. Under South Carolina law, collateral estoppel would not preclude contesting liability in this case.

Collateral estoppel can only apply if constitutional issues were actually litigated in the state proceedings, and their adjudication was necessary to support the decision in the state proceeding. Because the parties in this action differ from those in the state court, it must also be demonstrated that the Appellants had a full and fair opportunity to litigate the issues in state court. Beall, 315 S.E.2d at 190; Graham, 287 S.E.2d at 496.

The decision of the state appellate court belies any credible claim that constitutional issues were actually litigated or finally adjudicated. Given the standard of review applied in the state proceedings, it was totally unnecessary to reach constitutional issues, as the adjudication of those issues was not required or essential to support the state court judgment. Finally, Appellees did not have the opportunity to fully and fairly litigate the constitutional issues. They could neither conduct discovery, supplement the record nor offer testimony. The individual Appellees were not even parties to the state litigation. South Carolina courts would not apply collateral estoppel to this case.

Appellants' reliance on defenses raised as a basis for preclusion misses the mark. In its administrative appeals, Appellants alleged arbitrariness and constitutional violations, *albeit* without specificity. This action alleges similar causes of action. It was appropriate to raise a

preclusion defense, because the state issues would have been disposed of in the state court.

Judge Houck did not permit a collateral attack of a state order, and did not shift any burdens. The transcript reveals his careful review of the state court judgment and his determination that it did not reach federal issues. He rightfully questioned Appellants' counsel, asking for the basis of the contention that federal issues had been adjudicated. (Tr. Summ. J. Hr'g; J.A. pp. 580-584.) Such is hardly inappropriate since it was Appellants' burden on its motion for summary judgment to prove the elements of *res judicata* and collateral estoppel.

Judge Houck did not acknowledge that South Carolina would bar re-litigation. He only stated that state issues would be barred were the case to be remanded upon an award of summary judgment on federal issues:

> Then, the case would go back to state court and you would have pending all of the state claims on which I don't think the defendants could successfully argue, there wasn't a prior adjudication that would preclude issues from being raised.

(J.A. p. 583.)

As to Appellants' contention that *res judicata* precludes litigating issues which might have been litigated in a prior action, suffice it to say that

Appellees were not required to defend a case in state court that Appellants never tried.

Throughout their brief, Appellants continually reference the order of the state trial court for the proposition that its findings and characterizations of Appellees actions are conclusive as to this case. To avoid redundancy, Appellees will address this contention but once. The state proceedings were tried and adjudicated strictly on state law, applying a standard of review of whether the acts of Appellees were supported by sufficient evidence. That proceeding did not (and could not) analyze Appellees' conduct under federal law. The final state court judgment did not reach any constitutional issues, state or federal. The judgment was based solely on two issues, whether there was sufficient evidence to support the decisions made, and whether a remand would be futile. The law of the case is what was decided on appeal. See Barth v. Barth, 360 S.E.2d 309 (S.C. 1987). Thus, the disposition by the appellate state court circumscribes the trial court's findings and characterizations of Appellees conduct to the context of whether, under state law, Appellees had abused their discretion in evaluating Appellants' project.

II. S&H AND SUNRISE DO NOT HAVE STANDING.

The District Court was correct to hold that S&H and Sunrise lacked standing. Neither S&H nor Sunrise had any rights in the project. Those rights belonged solely to Boulevard (J.A. pp. 55-75.) Neither S&H nor Sunrise applied for a permit. Only

Boulevard Development did (J.A. 94-95.) The damages claimed by S&H and Sunrise are based on the legal rights and interests of Boulevard to a permit, not on their rights to that permit. To have standing, a party must rest its claim to relief on its own legal rights and interests, not on the legal rights or interests of other parties. Warth v. Seldin, 422 U.S 490, 500-501 (1975). Because S&H and Sunrise base their claims on the rights of a third party (Boulevard), their standing fails. Because neither applied for a permit, their standing fails. See S. Blasting Servs. Inc. v. Wilkes County, North Carolina, 288 F.3d 584 (4th Cir. 2002).

City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687 (1999), did not involve litigants who were strangers to the permitting process. The plaintiffs were the successors in interest to Ponderosa Homes, who had started the permitting process, which the Del Monte parties continued pursuing after the purchase. The parties before the court had actually been denied a permit. See Del Monte Dunes at Monterey, Ltd v. City of Monterey, 95 F.3d 1422, 1425 (9th Cir. 1996).

The fact that an entity denominated as "St. John's Inn" was a party to the state litigation does not confer standing to S&H or Sunrise. "St. John's Inn" is a non-entity, and under South Carolina law, a suit brought in a name which is not a legal entity is a nullity. Glen v. Dupont DeNemours & Co. Inc., 174 S.E.2d 155 (S.C. 1970).

Assuming the name "St. John's Inn" made S&H and Sunrise parties to the state proceeding, the

standard for standing in the state action differs from the standard required here.[2] In the state action, a party with a substantial interest could appeal (CAB Ordinance, § 607; J.A. pp. 52-53.) Under state law, that would include an adjacent property owner. Spanish Wells Prop. Owners Ass'n v. Bd. of Adjustment of the Town Hilton Head Island, 375 S.E.2d 487 (S.C. Ct. App. 1987), rev'd on other grounds, 267 S.E.2d 160 (S.C. 1988). A neighbor may be affected by a zoning permit decision, but it could not hardly be maintained that he had rights to the permit, itself. The same holds true for Sunrise and S&H.

The injuries claimed by S&H and Sunrise are like those of any affected third party such as an architect, consultant, builder or realtor, and are not traceable to the denial of a permit. See Odal Typographers Inc. v. City of New York, 560 F. Supp. 558, 560 (S.D.N.Y. 1983)(stating, "While such [third parties] may possess a property interest in the form of an 'account receivable,' their expectation as to the corporations' ongoing viability cannot be characterized itself as [a protected property interest). Were the rule otherwise, all creditors, officers, employees or anyone else who relied on the ongoing production of corporate income would be proper plaintiffs to this (§1983) suit").

---

[2] Since ownership of the name "St. John's Inn" belongs only to S&H, Sunrise has no basis to claim to have been party to the state proceedings. (Docket Entry 31; J.A. p. 8.)

III. THE DISTRICT COURT CORRECLTY DISPOSED OF THE DUE PROCESS CLAIMS.

The law of this circuit is clear, and longstanding. To establish a federal procedural due process claim, it is incumbent for Appellants to demonstrate that they had a property right that was denied by Appellees without due process of law. Sylvia Dev. Corp., 48 F.3d at 826. To prevail on a substantive due process claim, they must demonstrate that they had a property interest that was denied by Appellees, and that the acts of Appellees were so far afield of the outer limits of legitimate governmental action that no process could cure the deficiency. Id. at 827.

A. Appellants Did Not Have a Property Interest in a Permit.

To prove the existence of a property interest, Appellants must demonstrate "a legitimate claim of entitlement" to CAB approval. Bd. of Regents of State Coll. v. Roth, 408 U.S. 564, 577 (1972). A subjective, unilateral expectation that approval would be given is not enough. Id. at 577 ; Sylvia Dev. Corp., 48 F.3d at 826. The claim of entitlement must be found in state law, and if that law gives the local authority discretion to determine whether a permit should issue, there is simply no legally protected property interest for purposes of federal due process. Gardner v. Baltimore Mayor and Council, 969 F.2d 63 (4th Cir. 1992); Biser v. Town of Bel Air, 991 F.2d 101 (4th Cir. 1993), cert. denied, 510 U.S. 864 (1993).

The district court's ruling is in lockstep with precedent. There is little doubt but that CAB review calls for the exercise of discretion. The entire process contemplates the exercise of judgment. (Mot. Summ. J., Ex. 1, CAB Ordinance; J.A. pp. 45-53.) As found by the district court, and in keeping with the law of this circuit, this circumstance defeats the ability of Appellants to establish entitlement to CAB approval. CAB approval was always contingent on the exercise of discretion by the applicable reviewing board. Appellants' expectation of approval, no matter how sincere, is simply not enough to confer a property interest protectable by the Due Process Clause of the federal constitution.

Further, the CAB process allowed a post deprivation remedy through the state judicial system, a remedy the Appellees pursued with success.

> A due process violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process.

Tri-County Paving, Inc. v. Ashe County, 281 F.3d 430, 437 (4th Cir. 2002); see also Sylvia Dev. Corp., 48 F.3d at 829.

B. Appellants' Ownership Theory.

Appellants call on this Court to abandon precedent and adopt the proposition that ownership of property, itself, is beyond the reach of local

regulation. The Court should refrain from doing so, for obvious reasons.

As an initial matter, rights protected in a § 1983 action are those grounded in state law. The Fourteenth Amendment does not create property rights. Bd. of Regents, 408 U.S. at 577; Tri-County Paving 281 F.3d at 436. Parameters of property ownership and use are strictly state created rights, honored by federal courts when written and applied consistent with constitutional principles. To follow Appellants' lead would result in this Court rendering state regulation of property wholly subservient to the owner's desire to do what he wishes with his property. It would turn on its ear longstanding precedent that acknowledges the state's interest and right to regulate land use. Enforcement of the law of nuisance, zoning or planning would come at great risk to public coffers, much less the general health, safety and welfare. Furthermore, the docket of this Court would swell exponentially if any regulation or curtailment of property ownership were recognized as a federal case.

Contrary to the implication, the Constitution is alive and well in the context of land use. Land use regulations, like any other state or local law, must comport with principles of due process. That means facially a law must be neither vague nor overboard. Abernathy v. Conroy, 429 F.2d 1170 (4th Cir. 1978). When a law involves discretion, it must include standards to limit the subjective exercise of that discretion. S. Blasting Servs., Inc., 288 F.3d at 595; Geo-Tech Reclamation Industries Inc. v. Hamrick, 886 F.2d 22 (4th Cir. 1989). To provide a check on

its misapplication, a remedy for review is necessary. Sylvia Dev'p. Corp., 48 F.3d at 829. Taken together, these precepts require a land use regulation to apprise the property owner of the rules by which his application will be judged, the use of those rules, and a means to cry foul and have the call corrected when the rules are misapplied. Such is exactly what occurred here. There could not be purer due process.

C. Appellants' Behavior Theory.

Appellants contend there is no due process protection from "arbitrary and oppressive governmental behavior in the land use context". (Appellants' Brief, p. 33.) This assertion is simply wrong. Sylvia Dev. Corp. and Tri-County Paving, each land use cases, establish the principle that due process requires the availability of a remedy to check and correct the type of governmental conduct about which Appellants complain. The reason these cases were decided as they were, and why the district court here ruled as it did, is because the "arbitrary and oppressive governmental behavior" could be corrected. Sylvia Dev. Corp., 48 F.3d at 829; Tri-County Paving, 281 F.3d at 441. Appellants' real complaint is not with a lack of remedy, but with the remedy itself.

Appellants' attempt to distinguish aesthetic zoning from other zoning issues, like rezonings, variances or special exceptions, is transparent, and as found by the district court, is a difference without a distinction. Appellants knew, from day one, that the project required CAB approval. They knew, from day one, that CAB approval was part of the zoning

process, and they were not eligible for a building permit until that approval was secured. These Appellants are no different from the rezoning, variance or special exception applicant. Regulations applicable to the project required a review that embodied discretion, no different from discretion attendant to a rezoning, variance or special exception request.[3] The nature of "surprise" when a permit is denied is the same, as in each instance it arises from the exercise of discretion.

D. Appellants' Theory of Theoretical Discretion.

Appellants contend the findings of the state trial court that Appellees' conduct was egregious somehow circumscribes the discretion devolved upon them by the CAB ordinance. Such is not the case. Appellants contend here what the applicant did in Sylvia Dev. Corp., 48 F.3d at 810. They equate a finding of arbitrariness in a state administrative procedure with arbitrariness under the due process clause. The two are not the same, and this Court has so held on numerous occasions. See Sylvia Dev. Corp., 48 F.2d at 829; Gardner, 969 F.2d at 71; Biser, 991 F.2d at 105. Due process requires inquiry of whether discretion exists, not how discretion is exercised. Gardner, 969 F.2d at 68.

---

[3] For Appellants to insist that their project was consistent with zoning ordinances in effect at the time of application is incorrect. CAB approval is part of zoning, and compliance with it is as important as compliance with other aspects of the zoning regulations. See Peterson Outdoor Advertising, 489 S.E.2d 630.

Appellants' suggestion that the CAB ordinance did not devolve discretion sufficient to withstand a due process claim falls short. Precedent of this circuit could not be clearer: the existence of discretion in a permitting process, i.e., the ability to say no, precludes the establishment of a protected property interest. See United Land Corp. of Am. v. Clark, 613 F.2d 497, 501 (4th Cir. 1980) (where the court noted the law did not require an administrator to "... issue the permit perfunctorily"); Gardner, 969 F.2d at 68 (where the court noted "any significant discretion...defeats the claim"); Scott v. Greenville County, 716 F.2d at 1418-1419 (4th Cir. 1983) (the court noting municipal authorities "lacked all discretion"); Biser, 991 F.2d at 104 ("any significant discretion"); Sylvia Dev. Corp., 48 F.3d at 826 (denying a due process claim in light of reviews requiring interpretive judgment and discretion).

Absent the issuance of a permit being ministerial, or certainly close to it, there exists no legitimate claim of entitlement that triggers due process protection. A review of the CAB objectives, and the criteria to be used in attaining them, makes abundantly clear that the CAB had not just discretion, but substantial discretion, when considering a project. The CAB was not required to "issue the permit perfunctorily", and the process involved interpretive judgment so that even if Boulevard believed its submission comported with stated criteria, such would not be determinative because "the question of whether the criteria are met must be resolved by the exercise of judgment." Sylvia Dev. Corp., 48 F.3d at 826.

E. Appellants Received Due Process.

Because Appellants had no protected property interest in CAB approval, there is no viable due process claim, and the inquiry should stop. However, because Appellants have addressed other elements of due process, a reply is in order.

Appellants imply that the hearings were unfair and that the state determination of arbitrariness entitle them to damages under § 1983. Taking the latter issue first, the fact that the state court found the acts of Appellants to have been without evidentiary support, and thus arbitrary, is not dispositive of the issue of whether there has been a due process violation. This Court has been clear that a violation of state law is not tantamount to a violation of a federal right. Sylvia Dev. Corp., 48 F.3d at 829. This Court has repeatedly recognized that a state court order requiring approval of an application does not equate to the applicant having had a preexisting entitlement to that approval. Biser, 991 F.2d at 105. This Court has been steadfast that, if a permit could have been issued on non-arbitrary grounds, there is no federal due process claim. Gardner, 969 F.2d at 71.

Appellants' apparent displeasure with the remedy provided by state law is unfortunate, but does not assist their cause. The fact remains that the remedy accommodated exactly what they sought: a permit. Costs incurred during a permitting process are an inherent aspect of the process and have never been acknowledged as compensable.

Otherwise, Sylvia Dev. Corp., Gardner, and Biser would have been decided differently.

Aesthetic zoning is sanctioned by state law as a legitimate governmental purpose. Peterson Outdoor Adver., 489 S.E.2d at 234. The federal judiciary has recognized that interest. See Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).

The reasoning of this Court in S. Blasting Servs. is germane:

> Even if plaintiffs could prove that they had a property interest and that the County somehow deprived them of that interest by making it more difficult to operate an explosives business, plaintiffs' substantive due process claim fails under the third prong of the Sylvia test. The County's actions obviously did not fall beyond the outer limits of legitimate governmental action. Instead, the County's actions were rationally related to a legitimate governmental purpose. Therefore, plaintiffs "cannot demonstrate that the County's actions were arbitrary or irrational as required by Sylvia and Rucker.

S. Blasting Servs., 288 F.3d at 594 (citation omitted).

Neither public opposition nor a council sympathetic with that opposition gives rise to a

substantive due process claim. This Court has recognized the reality of zoning as "inescapably a political function", and has held that it is not "pernicious per se for a zoning authority to be influenced by political pressure in the community". Sylvia Dev. Corp., 48 F.3d at 827, 829. It is for this very reason that due process requires a remedy to cure deficiencies.

As to procedural due process, this Court in two recent decisions addressed the level of pre-deprivation and post-deprivation process to which an applicant is entitled. See S. Blasting Servs., 288 F.3d at 595; Tri-County Paving, Inc., 281 F.3d at 436. Appellants received that level of process.

There is no contention that notice and opportunity to be heard were denied. The contention is the hearings were unfair because the decision makers were biased. Viewing the evidence on this issue in the light most favorable to Appellants reveals that the mayor attempted to persuade a member of the appointed CAB board to vote against the project. His effort proved unsuccessful. No other member of the council (who, incidentally, were the final decision makers), was even aware of this contact or condoned it. (Reply to Mem. Opposing Summ. J., Ex. 2-8, J.A. pp. 537-559.) The mayor's vote was not determinative, as Appellants' plans were rejected unanimously at the first hearing and by a 6 to 1 vote at the second. Even if the mayor's conduct is deemed egregious, unethical or improper, there was no basis proffered by Appellants to warrant projecting his bias to the remainder of the council.

The implication that the second de novo hearing was predetermined is wholly unsubstantiated. At the second hearing, council was reviewing the project it had rejected in September. Appellants' architect acknowledged as much, and a comparison of the exhibits introduced at these hearings proves as much. Of the 47 exhibits introduced at the November hearing, at least 18 had been introduced in the September hearing. The remaining exhibits included either foam board mounted versions of exhibits introduced in September, or were exhibits that had nothing to do with the physical appearance of the project. (Mot. Summ. J., Ex. 20, 21; J.A. pp. 145-168; Supp. Mem., Ex. 4, 5; J.A. pp. 630-643.) The executive session conducted prior to the second hearing was to seek legal advice regarding allocation of time to parties wanting to be heard, and options available to the Council when considering the same application for a second time. The Council knew what was coming because of the second application that had been made to the appointed board and publicly noticed work sessions. They sought advice as to available options. At the second hearing, Appellants were given more time to present their case than called for by the ordinance, and at least one councilman attempted to open the door for additional information from Appellants during Council deliberations. (Supp. Mem. Summ. J., Ex. 19, J.A. 144-143); Mot. Summ. J., Ex. 9; J.A. pp. 661-662.) Such is hardly indicative of bias.

Appellants were accorded all the notice and hearings required by the CAB ordinance. Appellants were accorded all post-deprivation process as

provided by the ordinance and state law. Appellants successfully obtained the permit it sought by way of that very process. Appellants have failed to demonstrate a denial of procedural due process. See Tri-County Paving, 281 F.3d at 436-437.

IV. EQUAL PROTECTION.

In Sylvia Dev. Corp., this Court addressed an equal protection argument in a similar context and stated:

> The Equal Protection Clause limits *all* state action, prohibiting any state from denying a person equal protection through the enactment, administration, or enforcement of its laws and regulations. Even though a state law is facially neutral, its administration or enforcement can affect an unequal application by favoring one class of persons and disfavoring another. If the classification utilized is explicitly stated on the face of the statute or in the reasons given for its administration or enforcement, then the equal protection analysis requires us to determine whether an appropriate relationship exists between the legislative purpose and the classification adopted to achieve that purpose. On the other hand, if a classification is not explicitly stated, the plaintiff bears the initial burden of proving that a classification was nonetheless intentionally utilized.

> Snowden v. Hughes, 321 U.S. 1, 8, 64 S. Ct. 397, 401, 88 L.Ed 497 (1944). And only if the use of a classification is thus established does the equal protection analysis proceed with the inquiry into whether the classification furthers a legitimate legislative purpose. Sylvia Dev. Corp., 48 F.3d at 818-819.
>
> * * * * *
>
> Where a classification does not appear does not appear on the face of a statute and does not officially state it as a reason for administrative action, the plaintiff has the burden of proving that the classification was actually utilized in the administrative action, and that its use was intentional and purposeful.

Id. at 820.

Appellants argue that because their high rise was denied in the face of other high rises being approved, a case for a violation of equal protection exists. To have survived summary judgment on this theory, it was incumbent for them to show that the fact that this project was a high rise was the basis of Appellees' decision, and prompted the Appellees to engage in intentional, purposeful discrimination. See Sylvia Dev'p Corp., 48 F.3d at 820.

There is no evidence that the project was rejected because it was a high rise. The only evidence is that the project was rejected because of its facade treatments, its location on the site, and issues pertaining to the dumpster facilities and

storm water runoff. (Orders of Council, J.A. p.102; 112-113). Appellants have failed to demonstrate that their project being a high rise was the basis of its rejection.

Simply because high rises have been approved in the past, does not *per se* render Appellants' project "similarly situated." There is no evidence of any similarity between Appellants' project and other high rises, other than the fact that other high rises exist. As to the Caravelle parking garage, the only evidence in the record is that it differs, substantially, from that of Appellants. (Mot. Summ. J., Ex. 26; Kershner Affidavit, J.A. pp. 193-196.)

Even if Appellants' high rise was similarly situated, it was Appellants' burden to demonstrate purposeful discrimination. As noted in Sylvia Dev. Corp., if disparate treatment alone were sufficient to warrant a constitutional remedy, every mistake of a local zoning authority that resulted in an individual being treated differently from another similarly situated would rise to the level of a federal constitutional claim. Sylvia Dev. Corp., 48 F.3d at 818-819. As to the contention that a state court ruling established a prima facie equal protection claim, the Sylvia Dev. Corp. court held:

> We reject appellants' theory as a matter of law. While an equal protection claim must be rooted in an allegation of unequal treatment for similarly situated individuals, a showing of such disparate treatment, even if the product of erroneous or illegal state action, is

> not enough by itself to state a constitutional claim.

Id. at 825.

There is no evidence that these Appellants were subjected to purposeful, invidious discrimination. Opposition to the project was varied. Complaints included the following: the size and siting of the tower; its shadowing effect on adjoining structures; issues of disruption of view; potential wind tunnel effects; storm water effects; the location of the dumpster; traffic; and noise. (Mot. Summ. J. Ex. 23-25; J.A. pp. 171-192.) At most, what is revealed is that the public was opposed to the project for a variety of reasons, some of which were relevant to CAB review and others not.

> While discriminatory motivations of people who testify before a decision making board might in limited circumstances be probative of the board's motivations, this could only be true where public testimony was overwhelmingly opposed to a project for a distinct discriminatory reason, and board members where clearly swayed by that public opposition, fully aware of its basis in discrimination and prejudice.

Id. at 824.

This reasoning has application here. The opposition to the project was not confined to a distinct

discriminatory reason, and there is no evidence that Appellees knowingly acted in response to any deliberate or discriminatory classification. The decisions made had a rational relation to CAB review, which is all that is required when a suspect class is not implicated. See Id. at 820.

Finally, responding to public opposition does not rise to the level of a constitutional violation. This Court has recognized the politics inherent to zoning. In Sylvia Dev. Corp., this Court made note of an elected zoning official's responsibility to mediate between developers, residents, commercial interests and those who oppose and support growth and development. Id. at 828. The record here reveals legitimate issues being raised pertaining to aesthetic review. The record here reveals Appellees were pursuing a legitimate, governmental concern. Their decision was overturned, not because they were acting outside the scope of a legitimate state interest, but because of insufficient evidence.

These Appellants are like the litigant in Sylvia Dev. Corp. The most they could prove if this issue were to be tried is that, perhaps, similarly situated developers were treated differently, without an adequate evidentiary basis for the differing treatment. Such does not give rise to a viable claim for a violation of equal protection, and the district court was compelled to grant summary judgment for Appellees on the equal protection claim. Id. at 825.

V. THE DISTRICT COURT CORRECTLY DISPOSED OF THE TAKINGS AND INVERSE CONDEMNATION CLAIMS.

A. Appellants' So-Called Antecedent Rights.

Appellants seem to assert that because their project met technical requirements of the zoning ordinance pertaining to matters as use, height, setback and density, they had a "right" to build the project as proposed, which "right" was denied by virtue of Appellees' permit denial. These Appellants had no such "right."

Appellants were required, in addition to complying with the technical requirements of zoning regulations, to secure CAB approval. They had no right to build the project until that approval was given. The state Court of Appeals so held.

> As previously noted, respondents' building plan met all requirements of the City zoning ordinance and building codes except for CAB approval.

(J.A. p. 423) (emphasis added.)

In short, Appellants had no "antecedent property rights" to build the project without first having secured CAB approval.

B. The Adjudicatory Delay.

Absent deprivation of all economically viable uses of land, a delay in obtaining a building permit is a non-compensable incident of ownership, under state and federal law. See First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); Sea Cabins on the Ocean, IV Homeowners Ass'n. v. City of N. Myrtle Beach, 548 S.E.2d 595 (S.C. 2001). Appellants assert, and for the first time, that the delay was extraordinary and somehow traceable to Appellants. The record does not substantiate this assertion.

First, CAB denial did not deprive Appellants of all economically viable uses of the site. In fact, the denial of CAB approval had no effect whatsoever on the uses of the site. The inn and restaurant remained open, and the area of the site proposed for the high rise remained available for parking (Mot. Summ. J., Ex. 28; J. A. pp. 201-203.)

Second, the delay about which Appellants complain was not out of the ordinary. Appellant Boulevard first applied for CAB approval in August 1998. By November 1998, it had been through that process, twice. The Appellants promptly issued final decisions, on September 8 after a September 3 hearing, and on November 25, after a November 10 hearing. Such could hardly be termed dilatory.

The delay about which Appellants really complain is the time it took for its administrative appeals to be judicially reviewed. Appellees have no control over the appellate trial dockets, and there

has never been any assertion, much less any proof, of bad faith litigation.

The district court correctly disposed of the inverse condemnation and taking claims. The delay incurred here was a by-product of the adjudicatory system, and as found by the district court, not so extraordinary as to raise constitutional implications.

C. Penn Central Analysis.

As noted by the district court, even if the adjudicatory delay triggered a cognizable harm under takings jurisprudence, to determine if that harm worked a taking would require analysis under Penn Central and its progeny. See Penn Central, 438 U.S. 104; See also Tahoe-Sierra Preservation Council, Inc. v. Tahoe-Sierra Planning Agency, 535 U.S. 302 (2002). Penn Central would require consideration of the extent to which the regulation interfered with reasonable investment – backed expectations, the regulation's economic effect on the landowner and the character of the government action. Penn Central, 438 U.S. 104 The district court applied these factors to the facts of this case and correctly concluded that no taking occurred.

As to the character of the contested action, Appellees were pursuing a legitimate state interest. South Carolina affirmatively sanctions aesthetic zoning, and its supreme court has specifically upheld this very CAB ordinance. Peterson Outdoor Adver., 489 S.E.2d at 234. The fact that Appellees erred in the assessment of the project does not change the

character of their action or remove it from the realm of a legitimate interest.

The denial of CAB approval did not, in any way, affect Appellants' use of their property. Hotel and restaurant operations continued. The fact that bookings were slowed was because of Appellants' unilateral, subjective expectation that they would receive CAB approval, an expectation not protected by law for reasons cited herein. As to the economic effect of the denial, Appellants were able to sell the property at a profit of over $800,000.00, with the CAB denial still in place. (Mot. Summ. J. Exs. 2, 16, 17; J.A. pp. 54-58, 124-136.) As found by the district court, such could hardly be "economic harm" in the constitutional use of that phrase.

D. Exactions.

This case does not involve exactions. This case arises from the denial of a permit, not the award of one conditioned on compliance with certain conditions. In Del Monte Dunes, 526 U.S. 687 (1999), the Supreme Court held the rough proportionality analysis of Dolan v. City of Tigard, 512 U.S. 374 (1994) is inapplicable in cases involving permit development denials. Del Monte Dunes, 526 U.S. at 702, 703.

In any event, the Appellants did not exact anything from Appellees. Appellants' reference to an "exacted" prescriptive view easement and public sidewalk were issues that came before the CAB. On appeal to the City Council, neither of these requirements was imposed. The findings of the

Council pertaining to location and facade treatments of the tower and parking garage, the location of the dumpster facilities and the operation of the storm water management plan were not exactions. They were judgments reached in applying CAB review criteria. The state court did not find consideration of these issues inappropriate. It merely found that there was not sufficient evidence to support the decisions reached with respect to them. (J.A. pp. 417-426.)

CONCLUSION

The district court appropriately disposed of the issues raised by this case. State preclusion rules would not bar Appellants from contesting liability for the due process, equal protection and takings claims. Two of the Appellants, Sunrise and S&H, have no standing. Appellants have no viable due process, equal protection, inverse condemnation or taking claims for the reasons herein stated.

It is respectfully submitted that the decision of the district court is correct, and should be affirmed.

REQUEST FOR ORAL ARGUMENT

Due to the numerous legal issues implicated by this action, Appellees believe oral argument would benefit the court in its review.

Charleston, South Carolina
February 8, 2005

/s/

Frances I. Cantwell, Esq., Fed. Id. No. 49
William B. Regan, Esq.. Fed Id. No. 3234
Regan and Cantwell, LLC
105 Wappoo Creek Drive, Suite 1-A
Charleston, South Carolina 29412
Tel: 843-762-8282
Fax: 843-762-8284

L. Gregory C. Horton, Esq., Fed. Id. No. 7103
Adriane Malanos Belton, Esq., Fed. Id. No. 9327
Buist, Moore, Smythe & McGee, PA
P.O. Box 999
Charleston, South Carolina 29402-0999
Tel: 843-722-3400
Fax: 843-723-7398

Attorneys for the Defendants-Appellees

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS
HON. J. STANTON CROSS, JR.,
MASTER-IN-EQUITY
FIFTEENTH JUDICIAL CIRCUIT

CASE NOS. 98-CP-26-3516, 98-CP-26-4311

Boulevard Development and St. John's Inn, — Respondents,

The City of Myrtle Beach, — Appellant.

RESPONDENTS' FINAL BRIEF

Howell V. Bellamy, Jr.
Douglas M. Zayicek
BELLAMY, RUTENBERG,
COPELAND, EPPS, GRAVELY
& BOWERS, P.A.
Post Office Box 357
Myrtle Beach,
South Carolina 29578-0357
(843) 448-2400
Attorneys for Respondents

William B. Regan
Frances I. Cantwell
REGAN & CANTWELL
104 Church Street
Post Office Box 1001
Charleston, South Carolina 29401-1001
Attorneys for Appellant

ARGUMENT[74]

A. STANDARD OF REVIEW

As a preliminary matter, it must be noted that the parties disagree as to the appropriate standard of review. Appellant argues this Court must reverse Judge Cross if there is any evidence to support the City's decision to deny Respondents CAB approval.[75] In support of its position, Appellant relies on *Peterson Outdoor Advertising* v. *City of Myrtle Beach,* 489 S.E.2d 630 (S.C. 1997), wherein the South Carolina Supreme Court strongly affirmed Judge Cross' ruling that Appellant had been arbitrary and subjective in denying CAB approval.[76]

Respondents agree that *Peterson* controls this appeal.[77] However, Appellant misreads the standard of review employed in *Peterson.* In *Peterson,* the South Carolina Supreme Court specifically held a zoning decision must be overturned if: 1) it is arbitrary or subjective; 2) it is based on errors of law; 3) it is without evidentiary support; 4) the board acts

---

[74] Judge Cross' Order provides an in-depth analysis as to why Appellant's denials must be reversed. Respondents adopt Judge Cross' reasoning *in toto,* and dedicates the Argument section of this Brief to respond to Appellant's claims.

[75] Appellant's Initial Brief, p. 5.

[76] Ironically, Judge Cross was also the trial judge in *Peterson* and keenly aware of the law and issues in this case.

[77] On page 10 of Appellant's Initial Brief, Appellant states *Peterson* "is the seminal case for the issues at hand."

arbitrarily or unreasonably; 5) or where, in general, there is an abuse of discretion. *Id.* at 633. Thus, contrary to Appellant's argument, even if there is "evidence" to support Appellant's CAB denial, that denial must be reversed if it is arbitrary or subjective, based on errors of law, without evidentiary support, unreasonable, or there is an abuse of discretion.

The Supreme Court in *Peterson* held Appellant's CAB denial for the billboards at issue in that case was completely arbitrary and subjective, and as stated above, strongly affirmed Judge Cross on that point The Court specifically rejected the City's argument that it could apply subjective standards or reject a project for solely arbitrary and subjective reasons, and stated "[w]hat one person may find unsightly or inharmonious may be pleasing to another." *Id.* Because there is overwhelming evidence in this case to support Judge Cross' Order reversing Appellant's CAB denial for the same reasons relied on in *Peterson,* his Order must be affirmed.[78]

---

[78] Contrary to Appellant's argument, our appellate Courts have always given great deference to the trial court's findings. It has always been the law that our appellate courts must affirm the trial court if at all possible, and there is a presumption that the trial court's ruling was correct. *See, e.g., Horton v. Greyhound Corp.*, 128 S.E.2d 776 (S.C. 1962).

B. THE RECORD DOES NOT CONTAIN ANY OBJECTIVE, NONARBITRARY EVIDENCE TO SUPPORT APPELLANT'S CAB DENIALS, AND THE BURDEN IS ON APPELLANT TO PROVIDE SUCH EVIDENCE

Appellant incorrectly argues the burden was on Respondents to show their plans should have received CAB approval. The right to use one's property consistent with an approved use in a zoning ordinance is a fundamental property right, and it is clearly Appellant's burden to show objective, nonarbitrary facts as to why Respondents' plans should not be approved. Prior to the first appeal before City Council, City Attorney Joe Wettlin specifically told Council that "Council must state facts that support the decision."[79] The CAB denials, and Orders of City Council, are wholly void of any facts to support the arbitrary and subjective alleged reasons for denial recited in those documents.[80]

* * * * *

---

[79] Transcript of September 3, 1998 City Council Hearing, Circuit Court Record on Appeal, Item 4, (R. p. 288.11. 5-9).

[80] *See* CAB Disapproval Form, Circuit Court Record on Appeal, Item 3, (R. pp. 483, 484); Orders of City Council, Circuit Court Record on Appeal, Items 5 and 9, (R. pp. 271-282

C. JUDGE CROSS CORRECTLY RULED APPELLANT'S DENIALS VIOLATED RESPONDENTS' DUE PROCESS AND EQUAL PROTECTION RIGHTS

Judge Cross ruled Respondents' due process rights were violated in that Appellant refused to provide objective reasons and evidence to support its denials, and refused to give Respondents any objective guidance as to what they could do to gain Appellant's approval. These findings are correct and must be affirmed.

Our Supreme Court specifically told Appellant in *Peterson, supra* that it can not simply rely on subjective or arbitrary reasons to deny a building permit or CAB approval. Appellant, however, refused to heed that mandate and finds itself in the same position. Every reason relied on by Appellant is wholly arbitrary or subjective, and does not provide Respondent any guidance as to what it could do to get Appellant's approval.

Appellant can not simply say, for example, that Respondents' parking garage wall is not decorative enough without also saying specifically what it does not like about the wall, giving Respondents objective guidance on what changes could be made to get approval. Similarly, Appellant can not simply say Respondents' storm water management plan does not "adequately address Appellant's concerns," when everyone that has reviewed the plan, including the Department of the Interior and Appellant's own staff, stated Respondents' plan would actually be beneficial to the

water quality in the swash and reduce the runoff quantity in the swash.

Further, Appellant can not simply say Respondents' plans are "incompatible" or "inharmonious" with others in the neighborhood. This is what Appellant did in *Peterson,* and was soundly admonished by our Supreme Court. Contrary to Appellant's argument, it does not have unfettered discretion to reject an applicant's plans. Appellant's ordinances unquestionably allow Respondents to build a high rise on their property. This right can not be denied by Appellant's arbitrary and subjective whims, or left to the subjective desires of neighboring property owners.[110]

Appellant's actions have left Respondents scratching their heads. Appellant has given no objective guidance as to how Respondents could change their plans in order to get Appellant's approval. Respondents have repeatedly showed good faith, and told Appellant it would: 1) do whatever Appellant wanted with regard to the trash compactor and the parking garage wall; 2) that money was no object; 3) add a sidewalk for Appellant; 4) add additional landscaping, etc., What else can Appellant do? Due process does not require

---

[110] See. *e.g., State ex rel. Garofalo* v. *Desselle,* 149 So.2d 621 (La. Ct. App. 1963) (ordering the issuance of a building permit for a two-family dwelling because one can not be denied based on some residents wanting the subdivision to remain only single-family dwellings); *Spann v. City of Dallas,* 235 S.W. 513 (Tex. 1921) (holding that a decision left to the "caprice, whim or arbitrary discretion of a board, or an officer, or to the desires of the owners of near-by property" is invalid).

an applicant to keep spending time and money to revise plans and keep appearing before Appellant with the hope that someday its plans may be approved, without even knowing what is wrong with the plans.

Appellant's denials also deprived Respondents of equal protection under the laws. As stated above, Appellant gave no reason why Respondents were required to comply with an arbitrary and greater setback requirement than every other citizen in Myrtle Beach. Respondents complied with Appellant's setback requirements, but Appellant won't let Respondents build their building within 52 feet of the Sea Mark Tower. Appellant therefore created a greater setback requirement for Respondents' property that does not apply to every other property owner. This is a per se equal protection violation, and correctly held as such by Judge Cross.

Also, Respondents showed the Caravelle parking garage, located just one block north of Respondents' property, was recently approved with a completely blank wall. Appellant, however, would not say why Respondents' highly decorative wall was not good enough. Therefore, Respondents were singled out and treated differently from another developer just one block away. This is another per se equal protection violation, and correctly held as such by Judge Cross.

Further, several CAB members commented they never considered technical aspects such as storm water management when reviewing a

project.[111] Such determinations have always been made by City staff and engineers charged with that responsibility and knowledge. Thus, CAB took it upon themselves to go beyond their duties to review building exteriors, landscaping, etc. This is yet another is a series of clear equal protection violations committed by Appellant.

Appellant argues Respondents' rights were not violated because CAB review is a site specific exercise. This argument ignores the concepts of due process and equal protection. Everyone who comes before Appellant must be considered on its merits, but the fundamental requirements of equal protection and due process are that everyone is treated the same under the same guidelines and procedures. Appellant clearly violated these concepts in how it treated Respondents as compared to other developers and developments.

---

[111] Transcript of October 1, 1998 CAB Hearing, Circuit Court Record on Appeal, Item 7, (R. pp. 617, 618).

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF HORRY

Boulevard Development and
St. John's Inn,

Plaintiffs,

-versus- CASE NO: 98-CP-26-3516

The City of Myrtle Beach,

Defendant.

Boulevard Development and
St. John's Inn,

Plaintiffs,

-versus- CASE NO: 98-CP-26-4311

The City of Myrtle Beach,

Defendant.

THE HEARING HELD BEFORE
HONORABLE J. STANTON CROSS, JR.
MASTER-IN-EQUITY FOR
HORRY COUNTY, SOUTH CAROLINA

Tuesday, February 23, 1999

2:00 p.m. – 5:00 p.m.

The following is the hearing held before Honorable J. Stanton Cross, Jr., Master-in Equity for Horry County, South Carolina on Tuesday, February 23, 1999.

* * * * *

evidence.

Your Honor, our Supreme Court has said that it is, per se, arbitrarily unreasonable to deny a property owner the ability to use his property in any legal fashion. And I read with interest the Delmonte decision, which is reported at 95 Federal Reporter —

THE COURT: is that the California case where they had the campground, is that that case---

MR BELLAMY: It's out in---

THE CASE: Is that that case?

MR. BELLAMY: Yes, well, it's in Monterey. And these beautiful sand dunes, if you've ever been out there, that they're just on the ocean out there, and this developer was attempting to get approval from City Council and from staff. He had a hard time getting through staff. And they were denying him, continually denying him the right to get a building permit; and, ultimately, in the 2nd Circuit, he got a

verdict of over a million dollars against the city, and the court dealt with it.

THE COURT: I don't know how much precedent a California property case would have on our Supreme Court anyway.

MR. BELLAMY: Well, our Supreme Court dealt with this, Your Honor, Delmonte Dunes came out of the Supreme Court. But it said that the Fifth Amendment is violative when land use regulations does not substantially advance legitimate state interest or denies an owner economically the viable use of his land.

Even if the city had a legitimate interest in denying Delmonte's development application, its action must be roughly proportionate to furthering that interest. That is, the city's denial must be related both in nature and extent to the impact of the proposed development.

But, primarily, Your Honor, we look to the Peterson case to give, hopefully, The Court guidance in what had occurred. If the Defendant's acts in this case are allowed to stand, CAB or Council can deny any project for any reason, regardless of the ordinance. This includes denying a project for purely personal, political, or financial reasons by simply stating the project is not compatible with existing buildings in the neighborhood. That's so subjective. There's no way in the world to tell.

CAB and City Council must have clear, specific objectives, apply them, and apply them in a

non-arbitrary, subjective manner. Although the CAB ordi[illegible]ce contains subjective criteria that can be consi[illegible]d, these criterion must be applied objectively and the Defendant must tell the applicant what must be done to get his plans approved.

Now, one of the options in the Peterson case was The Court said, if you recall, The Court, as I read that decision, went all the way through and dealt with the matter and dealt with it, and said that they disagreed, said, "The City claims both CAB and City Council based their decision on the criteria set forth in the CAB Ordinance; therefore, their decisions were not arbitrary and an abuse of discretion. We disagree." They agreed with His Honor and his ruling.

And it says that, they went on to say, "...a decision of a municipal zoning board will be overturned if arbitrary...('The exercise of police power is subject to judicial correction...if the action is arbitrary and has no reasonable relation to a lawful purpose')...(when the zoning board acts arbitrarily, its decision will not be upheld)...'the decision of the zoning board will not be upheld where it is based on errors of law...or where there is no legal evidence to support it, or where the board acts arbitrarily or unreasonably...' When exercising discretion, a local board must be guided by standards which are specific in order to prevent the ordinance from being invalid and arbitrary...instead, the decision, "was based on the unfettered will of the city)." They're talking about a Rock Hill case. ""The concept of vagueness or indefiniteness rests on the

constitutional principle that procedural due process requires fair notice and proper standards for abjudication.'"

The Courts said, in very strong language. "The CAB failed to apply any of the specific criteria of the CAB Ordinance in reaching its conclusion to deny the application, thus rendering its decision...The CAB denied the applications because it found the proposed billboards caused 'too much clutter;' they did not add to the aesthetics of the area; they did not look good;' and they were incompatible with the area. None of these reasons are enumerated as criteria the CAB is required to consider when determining whether to approve or deny a proposed structure."

"Further, during the de novo hearing, City Council failed to apply or articulate any of the specific criteria of the CAB Ordinance. The decision of the City Council was based upon the objectives and purposes of 601.2. In City Council's written order, it is considered the relationship of the billboards to surrounding properties and found 'these applications, if approved, would not enhance the appeal of the City to residents or visitors, and would not serve to foster sightly or harmonious development.' Even though 604.2 provides the objectives and purposes of 601 'shall serve as additional criteria and standards,' a decision based solely on 601.2 objectives gives rise to an unconstitutionally vague application...of the ordinance and renders City Council's decision arbitrary and capricious and an abuse of discretion."

And, finally, it says, "The 601.2 objectives are extremely broad and fail to provide any guidance to a potential applicant of the basis for denial or actions necessary to obtain CAB approval." I don't know how more clear The Court could be. "To deny a permit based solely on the ordinance's objectives grants CAB and/or City Council overly broad discretion and allows them to arbitrarily decide whether to approve a proposed structure." And we

* * * * *

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

RE: St. John's Inn
Applicant

THE DE NOVO HEARING
HELD BEFORE
MYRTLE BEACH CITY COUNCIL
ACTING AS THE
COMMUNITY APPEARANCE BOARD

Thursday, September 3, 1998

7:57 a.m. – 10:10 a.m.

The following is the de novo hearing held at Chapin Memorial Library, located at 400 14th Avenue North, Myrtle Beach South Carolina, before Myrtle Beach City Council acting as the Community Appearance Board on Thursday, September 3, 1998.

* * * * *

So, as I said, we are very concerned about this neighborhood. We probably have a couple of thousand, what I consider, homeowners in that area. It needed to be protected, and I think that when they say that in all these years this is the first one that's been turned down; in all of my years, I do not remember a building that has been jammed onto a site such as this one, backing up to an R zone. Most of the other projects, they tear down the old building, they come up with a better design.

I think this case is unique and that's why there, perhaps, hasn't been another case exactly like it. Thank you.

* * * * *

Mayor McBride: Thank you, Mr. Bragg. Now we'll start our discussion with the representative on behalf of the board, sir.

Mr. Barnett: Thank you, Mr. Mayor. I just have a couple of comments.

First of all, for reasons that have already been covered which I won't go over again, but the board of Sea Mark Tower Association is, of course, very concerned and does oppose this new tower, again, for many of the reasons previously stated.

Also, they are particularly concerned about the impact that this tower may have on th. wetlands that adjoin this building site. As you know, Cane Patch Swash adjoins the St. John's property, and this is a tidal marsh and, therefore, is a critical wetland, and is in the most critical category.

* * * * *

Mr. Barnett: I just wanted to raise that. I'm not going to pursue that further at this time, but did want to mention it, that, that, again. I think it affects the jurisdiction and, secondly, and most important for the purposes of this hearing, did not allow us to respond. But I am concerned, quite, and

the association board is quite concerned about the critical area adjacent.

Also, there is great concern by the association about the additional traffic which would be put in this area. These are side streets. This is a ninety-eight unit tower. It's going to have, in that event, probably a hundred plus cars that are going to be added. I don't know if traffic studies are going to be, have been done, what they show, but they're very concerned about the additional traffic flow.

* * * * *

This is my home and the home of nine other families. We don't have lawn mowers, we don't have bird baths, but we live here. Anybody else want one? You get used to seeing these condos and you assume that they're all full of tourists. But all over town you have people who used to be tourists and then they moved here. But I'm going to talk about Sea Mark Towers and make a point about the neighborhood, I may need a little bit of help here. I don't know.

Mr. Helms: I tell you what. Why don't we put one of these up here behind that to support that for you.

Ms. Bosworth: That would probably be a pretty good idea. Thank you.

Mr. Helms: Sure.

* * * * *

squeeze play. And now we have the St. John's being crammed into our neighborhood.

My specific concerns are these: The site is environmental density, we can talk about trench drain systems all we want, but the water has to go somewhere and it's going to leach into the ground. Has there been a study by a structural engineer relative to the improbability of damage to nearby buildings and homes by having construction equipment.

What about the parking garage? Will residents trying to enjoy their porches and balconies be driven inside by exhaust fumes of over a hundred additional automobiles?

What about the dumpster, where is that supposed to be? Where is the air conditioning complex with all the attendant noise, the generators, the pumps?

What sort of lighting will there be? Will it light up the whole neighborhood as the Patricia North does? You could almost do brain surgery at the Patricia North for pete's sake.

What about the shadow affect, will the high-rise block the sun from the neighborhood?

How do we avoid the constant aggravation of observing the balconies at St. John's being used twenty-four hours a day with guests checking in and out, maids cleaning, all within a short distance of our homes?

The proposed tower would be an incongruity in the neighborhood. It would be the kind of in your face structure that doesn't even blend aesthetically with the original building for the St. John's. The proposed tower is already affected property values in that some residents are have difficulty selling their properties because of the proposed St. John's.

Council members, your Community Appearance Board exhibited a great deal of courage in denying a building permit for this project, I commend them for their vision. And now you come to your la momento de verdad, your moment of truth. Is visioning for real, or is it just an

* * * * *

I thank you very much for your time and attention.

Mayor McBride: Thank you, Ms. Ferguson. Mr. Reimer?

Mr. Reimer: I'm Arthur Reimer and I live at Sea Mark Towers. All my colleagues have made some very good points and perhaps I might be a little redundant, but I'll say what I have to say.

When the people speak we hope that you, the powers that be, our representatives, are listening; and we are aware that you have a tough job. People speak when they suffer and their well-being is threatened. We're now talking about the proposal by St. John's.

Crowding the proposed addition behind their present facility, they would have the garage area facing very close to the adjoining Sea Mark Tower with the resulting automobile noise and the coming and going of vehicles at all hours to the detriment of the adjacent homeowners. But more than this, the garage would exit onto 69th Avenue North,

* * * * *

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

RE: St. John's Inn

THE DE NOVO HEARING
HELD BEFORE
MYRTLE BEACH CITY COUNCIL
ACTING AS
COMMUNITY APPEARANCE BOARD

Tuesday, November 10, 1998

7:30 p.m. – 8:50 p.m.

The following is the de novo hearing held at the Myrtle Beach Law Enforcement Center located at 1101 North Oak Street, Myrtle Beach, South Carolina, before Myrtle Beach City Council acting as the Community Appearance Board on Tuesday, November 10, 1998.

* * * * *

what I perceive to be the truth
best interest of the community.

However, when I found out this was coming back before us, I went through all of my minutes again. The one document that Mr. Pegram was referring to, saying this was a zoning issue and not a CAB issue and as far as what would be approved by CAB, Mr. Pegram knows very well, prior to the meeting of September 17th. I explained to him that that building is a site specific problem placed on that site, that the developer should originally come, as so many developers did, not making a tunnel effect on the Boulevard, tearing down the old structure, putting it closer to the Boulevard and still green space there, funneling the traffic out to Kings Highway, and I've heard so many times, they want to maintain the architectural integrity of that building. The reason that Mr. Pegram said they do not want to do that was a question of economics, they wanted to keep the old building so they could make money off of it.

Mr. Pegram also said to me that he

* * * *

Mayor McBride: Thank you, Mr. Bragg. At this time we'll go to our fifteen minutes of the public, and I would only entertain that we ask Mr. Barnett to come first. Please, be respectful. If one of y'all goes twelve of fifteen, perhaps it would cut out other residents that would like to have something to say.

Mr. Barnett: Thank you Mr. Mayor. I'm here tonight representing the Sea Mark Tower Property Owners' Association which is one of many people and many groups in this area who are concerned about this proposed tower. There are a number of concerns. I'm just going to speak for about one minute and sit down so others can speak.

The association's particularly concerned about the location of this tower being place right next to Sea Market Tower. It will be in very close proximity. The positioning of the tower will cause a wind tunnel effect, which we have an engineer here who I will introduce on behalf of our association to speak as soon as I sit down. There will be a shadow effect. The wind tunneling effect will affect not only the neighboring areas but also the balconies of the condominium building where my clients live.

The solid waste compactor is still in an unsightly position where it was first proposed and which has been objected to from the beginning. It's going to be right next to our, my clients' property. There will be an increase in traffic flow. The groundwater – I'm sorry, the water, wastewater management is proposed to go into underground pipes which are perforated; and, as you know, this particular site is right next to a swash which is a critical area.

They're bringing a hundred and thirty new automobiles onto this property. All the oil and gas which drips from those and eventually washes into those perforated pipes will work, will make its way

into this swash because of this site. This is not a suitable location for this sort of thing.

The trees and shrubs which they propose to plant will be, largely, in a very narrow area which is shaded by these two large buildings next to each other. They will not survive. It will be unsightly. There are any number of reasons. I won't go into all of them; but I did want to express my clients' concern, and at this time would like to introduce Mr. Jim Justice, who is an engineer who would like to speak to several of these issues. Thank you.

Mr. Justice: My name is Jim Justice. I am a representative of Law Engineering. I work out of the Greenville, South Carolina office. I'm a registered engineer in seven states throughout the Southeast and the Midwest. I currently have ongoing projects in New York City, Chicago, Atlanta. So, I am familiar with high-rise applications and the building of high-rise buildings.

The thing, where I was involved with this project is I was doing unrelated work for the Sea Mark Towers in terms of renovation and repair work for them. When this issue came up with the St. John's, they asked me to do a very quick and very brief review of the drawings, the preliminary drawings, that were presented before the CAB

* * * * *

I'll skip all the introductions and stuff. This project that is now before us appears to be the same project you unanimously turned down a few weeks ago.

What would the developer have you do? He would rather have you change your mind than he change his plans. He, along with the builder and the Hoffman Group, have all made it clear that nothing is going to stop them from building this project. It is enough to make one think that the visioning process and the city's comprehensive plan mean nothing, let alone City Council and the CAB's opinion.

Quite a few of us were involved in these processes. And, one thing that is obvious is that at some time someone is going to have to say no to a developer. This project, where they are trying to put a size nine and half foot in a seven shoe, is the perfect place to start.

It's interesting that the city's visioning process was dubbed "It's Time," not one of these days, or sooner or later, or when we get around to it, but "It's Time." Let the developers know that it's time, time

* * * * *

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

RE: St. John's Inn
Applicant

THE DE NOVO HEARING
HELD BEFORE
MYRTLE BEACH CITY COUNCIL
ACTING AS THE
COMMUNITY APPEARANCE BOARD

Thursday, September 3, 1998

7:57 a.m. – 10:10 a.m.

The following is the de novo hearing held at Chapin Memorial Library, located at 400 14th Avenue North, Myrtle Beach South Carolina, before Myrtle Beach City Council acting as the Community Appearance Board on Thursday, September 3, 1998.

* * * * *

meeting was, the scheduled time for this meeting was certainly not conducive to a large turnout. However, over two hundred of my neighbors have entrusted me with their signatures to be used "To preserve," I'll quote this, "and protect the residential lifestyle that exists today." A copy of this signature list was turned over the Community Appearance Board at the last meeting.

As I'm sure you're aware, our neighborhood has changed in the last two years from the summer homes and beach houses of the past to the year around residences of retirees and young families alike. Perhaps it is time for our city planner to look at these changing dynamics and adjust the zoning to provide more protection.

With all this in mind, please, consider what burgeoning a second row of high rise towers will have on our tiny enclave. Surely, if the St. John's Inn is permitted to build what they now have planned, it will be the beginning of a domino effect.

It is very easy to see this lovely community of friends and neighbors being turned into the next Shore Drive with twelve story buildings stretching from 69th Avenue to the grand dunes. Quite a few of us are active participants in the city's recent visioning process and there is no doubt that the people did not envision this scenario.

Each of us has endorsed this process and we feel that, as it was originally entitled, it's about time.

With that, I'd like to ask each member of City Council to, please, stand behind the decision rendered by the Community Appearance Board and thanks again for your time.

Mayor McBride: Thank you, Mr. Holst. And the last lady to speak today is Ms. Maureen Altman.

Ms. Altman: I was hoping you'd pick me first. I've worked all night long, so I stayed up for this.

This is a petition that we

* * * * *

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

RE: St. John's Inn

THE DE NOVO HEARING
HELD BEFORE
MYRTLE BEACH CITY COUNCIL
ACTING AS

COMMUNITY APPEARANCE BOARD

Tuesday, November 10, 1998

7:30 p.m. – 8:50 p.m.

The following is the de novo hearing held at the Myrtle Beach Law Enforcement Center located at 1101 North Oak Street, Myrtle Beach, South Carolina, before Myrtle Beach City Council acting as the Community Appearance Board on Tuesday, November 10, 1998.

* * * * *

city process, and I hope that you will take it as such.

One of my concerns is that, if this developer is allowed to build a substandard project that will affect the neighborhood, think what the next ten marching up that street, on that side of the street, what impact they will have on the infrastructure, on traffic, on drainage, and all of the other problems that we've heard about.

I hope that the Council did not hear a reason tonight to change its mind. Thank you very much for listening and for being a part of the process as I think the ordinance suggests that you should be. Thank you, Mr. Mayor.

Mayor McBride: Could the previous speaker give your name, please?

Mr. Strauber: I'm sorry. My name is Bob Strauber, S-T-R-A-U-B-E-R.

Mayor McBride: Thank you.

Ms. Grove: They have four minutes and thirty-five seconds.

Mayor McBride: You have four minutes and thirty-five second, ma'am.

that very well. You always---

A: Of coming back, you know, with, with a---

Q: But this forms your record?

A: That's what is given to the applicant.

Q: And from this document he files his application for appeal?

A: I've never seen an applicant do it; but I'm assuming that's probably what they would have to use---

Q: This is the basis of the denial of the application?

A: Yes.

Q: And this is the record of the denial of that application?

A: That's what I think we've used.

Q: That's all I have.

RE-EXAMINATION

BY MS. CANTWELL:

Q: You attended the September hearing before the City Council as it was sitting in the capacity of the CAB as an appeal from your board?

A: Which---

Q: I'm sorry, the September 3, 1998 hearing. I don't know where it was located, maybe at the library.

A: That would have been the first one, yes.

Q: And were you there?

A: Yes.

Q: Had your board seen those elevations before?

A: No, none of it.

Q: Now, when Mr. Pegram came back before your board in October at the Magic---

A: Attic.

Q: ---Attic, did he present elevations to you then?

A: Yes. It was what was presented at the Council meeting.

Q: The Council meeting of September 3?

A: Right.

Q: Thank you.

RE-EXAMINATION

BY MR. BELLAMY:

Q: But what you had at that October 1 meeting was a full rendering and a complete set of plans and specifications?

A: No.

Q: October 1, at the Magic Attic?

(3)

No. 05-802

Supreme Court, U.S.
FILED
MAR 2 0 2006
OFFICE OF THE CLERK

In The

Supreme Court of the United States

SUNRISE CORPORATION OF MYRTLE BEACH; BOULEVARD DEVELOPMENT LLC; S&H DEVELOPMENT INC.,

Petitioners,

v.

THE CITY OF MYRTLE BEACH; MARK McBRIDE; JUDY RODMAN; RACHAEL BROADHURST; CHARLES MARTINO; WILSON CAIN; CRAIN WOODS; LARRY BRAGG; TOM CONN; TOM DAVIS; SALLY HOWARD; FRED ROURK, Individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF

Douglas M. Zayicek
Counsel of Record
Howell V. Bellamy, Jr.
George W. Redman, III
BELLAMY, RUTENBURG, COPELAND, EPPS, GRAVELY & BOWERS, P.A.
1000 29th Avenue North
Myrtle Beach, South Carolina 29578
(843) 448-2400

THE LEX GROUP DC • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

ISSUES BRIEFED IN REPLY

Petitioners respectfully submit this Brief addressing the following points, newly raised by Respondents' Brief in Opposition:

1. **THE COURT SHOULD ADDRESS A SPLIT BETWEEN THE CIRCUITS: SHOULD AN ENTITLEMENT BAR APPLY IN SUBSTANTIVE DUE PROCESS LITIGATION IN LAND-USE CASES – AN ISSUE THE FOURTH CIRCUIT SHOULD HAVE ADDRESSED**

2. **THE NUMEROUS FINDINGS OF FACT, CONCLUSIONS OF LAW, AND EXPRESS HOLDINGS CONCERNING RESPONDENT CITY'S OPPRESSIVE AND EGREGIOUS BEHAVIOR ARE THE LAW OF THE CASE**

TABLE OF CONTENTS

Page

ISSUES BRIEFED IN REPLY i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REPLY ISSUES 1

1. THE COURT SHOULD ADDRESS A SPLIT BETWEEN THE CIRCUITS: SHOULD AN ENTITLEMENT BAR APPLY IN SUBSTANTIVE DUE PROCESS LITIGATION IN LAND-USE CASES – AN ISSUE THE FOURTH CIRCUIT SHOULD HAVE ADDRESSED 1

2. THE NUMEROUS FINDINGS OF FACT, CONCLUSIONS OF LAW, AND EXPRESS HOLDINGS CONCERNING RESPONDENT CITY'S OPPRESSIVE AND EGREGIOUS BEHAVIOR ARE THE LAW OF THE CASE 3

CONCLUSION 5

TABLE OF AUTHORITIES

Page(s)

Cases

Barth v. Barth,
293 S.C. 305, 360 S.E.2d 309 (S.C. 1987) 3

DeBlasio v. Zoning Bd. of Adjustment,
53 F.3d 592 (3d Cir. 1995) 2

River Park v. Highland Park,
23 F.3d 164 (7th Cir. 1994) 2

Sacramento v. Lewis,
523 U.S. 833 (1998) 1

Statutes

28 U.S.C. § 1738 4

42 U.S.C. § 1983 1

1. THE COURT SHOULD ADDRESS A SPLIT BETWEEN THE CIRCUITS: SHOULD AN ENTITLEMENT BAR APPLY IN SUBSTANTIVE DUE PROCESS LITIGATION IN LAND-USE CASES – AN ISSUE THE FOURTH CIRCUIT SHOULD HAVE ADDRESSED

This Court should address the split between the circuits regarding the use of an entitlement bar as a threshold test in substantive due process claims in land-use cases. Respondents' Brief in Opposition would have the Court believe this task is unnecessary because the Fourth Circuit evaluated the municipal behavior in question and found there was no due process violation on the merits. This argument is opportunistic.

If the entitlement bar applies in land-use litigation, conscious shocking behavior that would violate the Due Process Clause is irrelevant.[1] Accordingly, the District Court below applied the entitlement bar and subsequently held that any abuse of discretion "is immaterial."[2] Thus, any discretion within a municipality's own ordinance will absolutely preclude any review of oppressive and egregious governmental behavior in land-use cases. Contrary to Respondents' contention, behavior could not have been a factor that was addressed by the Fourth Circuit.[3]

---

[1] Resp. Br. in Opp'n. at 8 (*citing Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (conduct is actionable under 42 U.S.C. § 1983 when it "shocks the conscience")).

[2] Dist. Ct. Order, App. at 23.

[3] Resp. Br. In Opp'n. at 6 (While the Fourth Circuit did characterize one portion of Petitioners' claim, Petitioners have never asserted that the City's actions were solely or simply arbitrary, *see e.g.* Br. of Pet. at 5, 22).

As Petitioners have noted, there is a deep and enduring split between the circuit courts of appeals on the entitlement bar. A majority apply the bar, but as Respondents note, two circuits have absolutely refused to apply the entitlement bar as a threshold analysis in land-use cases.[4] Oddly enough, these two circuits are the **only** courts that have addressed the fundamentally flawed logic of the entitlement bar, *i.e.*, that property ownership is not simply a municipal benefit.[5] Real property ownership is, and always has been, a property interest worthy of protection under the substantive due process clause.[6] Logic resoundingly favors the minority analysis, and this Court should adopt it.

Respondents' Brief in Opposition notes the only logical reason for the use of the entitlement bar in land-use cases: judicial convenience.[7] This is the case to address the fundamental flaw in the majority analysis.

The Constitution dictates that this Court should not turn a blind eye upon a fundamentally flawed and sharply criticized analysis that has absolutely precluded review of conscious shocking behavior in this land-use case — simply for the sake of convenience.

---

[4] Resp. Br. in Opp'n, at 7, n. 1. (*citing River Park v. Highland Park*, 23 F.3d 164 (7th Cir. 1994); *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592 (3d Cir. 1995).

[5] *River Park*, 23 F.3d at 165-66; *DeBlasio*, 53 F.3d at 600-01.

[6] *Id.*

[7] Resp. Br. in Opp'n, at 2 (The entitlement bars is simply a means of "preventing federal courts from being forums for questioning local zoning decisions.").

2. THE NUMEROUS FINDINGS OF FACT, CONCLUSIONS OF LAW, AND EXPRESS HOLDINGS CONCERNING RESPONDENT CITY'S OPPRESSIVE AND EGREGIOUS BEHAVIOR ARE THE LAW OF THE CASE

Respondents' Brief in Oppositions cites *Barth v. Barth*,[8] as support for the proposition that several express holdings and extensive findings of fact within the Trial Court Order[9] were impliedly abrogated or modified by the South Carolina Court of Appeals. First, the *Barth* case does not provide any support for this assertion. Second, the Trial Court Order was affirmed with an "any evidence" standard of review, *in toto*, and without any modification.

The issue in the *Barth* case was whether Dr. Barth was obligated to pay interest on his ex-wife's equitable distribution award during the pendency of an appeal during prior litigation.[10] In that case the parties had expressly agreed that this issue could be revisited in subsequent litigation.[11]

The behavior of Respondent City was litigated throughout every stage of the prior litigation. Obviously, there was no agreement or exception that would allow for the revival of this same issue between the parties now before this Court. Therefore, *Barth v. Barth* is irrelevant.

---

[8] 293 S.C. 305, 308, 360 S.E.2d 309, 310 (S.C. 1987).

[9] Trial Ct. Order, App. at 34-80.

[10] *Barth*, 360 S.C. at 310.

[11] *Id.* ("exceptions [in prior litigation] were specifically framed ... thus reviving the issue for re-examination in this case.").

Respondents' Brief in Opposition indicates that the review of the Court of Appeals was restricted by the same "any evidence" standard of review. The Court of Appeals decision states that evidence did exist that would support the Trial Court Order, and it was therefore affirmed, **without any modification**.

Under 28 U.S.C. § 1738, the sole issue is whether a Court of the State of South Carolina would be bound by the Trial Court's express conclusions of law finding Respondent City's actions were "a denial of [Petitioners'] due process and equal protection rights."[12] These holdings were supported by an extensive review of the City's conduct, which was found to be in "flagrant disregard" of state law,[13] as "per se arbitrary and unreasonable."[14]

As to the Respondent City's oppressive and arbitrary behavior, preclusive effect should be given to the holdings and findings of the state trial court. In the alternative, and at a minimum, these findings are competent evidence, and therefore this case should not be summarily dismissed.

---

[12] Trial Ct. Order, App. at 46, 80.

[13] Trial Ct. Order, App. at 63 ("Defendant's actions in the case are in flagrant disregard of the Supreme Court's ruling in Peterson"); see also Trial Ct. Order, App. at 65, 67, and 69.

[14] Trial Ct. Order, App. at 72.

CONCLUSION

Petitioners respectfully pray this Court will grant the Petition for Certiorari to address the split between the circuits, and to declare that Respondents' abusive and oppressive behavior is in fact relevant in the analysis of their due process claims.

Respectfully submitted,

Douglas M. Zayicek
Counsel of Record
Howell V. Bellamy, Jr.
George W. Redman, III
Bellamy, Rutenberg, Copeland,
Epps, Gravely & Bowers, P.A.
1000 29th Avenue North
Myrtle Beach, SC 29578
(843) 448-2400